In the

Supreme Court of the United States

October Term, 1968

No. 138

ADAM CLAYTON POWELL, JR., *et al.*,
Petitioners,

v.

JOHN W. McCORMACK, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

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Constitutional and Statutory Provisions Involved

This case involves the following constitutional and statutory provisions, the texts of which are set forth in Appendix A to this brief:

United States Constitution:

Article I, section 1;
Article I, section 2, clauses 1, 2 and 5;
Article I, section 3, clauses 3, 5-7;
Article I, section 5;
Article I, section 6;
Article I, section 9, clause 3;
Article III, section 1;
Article III, section 2;

Article IV, section 4;
Article VI, clauses 2 and 3;
Amendment V;
Amendment XIII;
Amendment XIV, sections 1, 3 and 5;
Amendment XV;
Amendment XX, sections 1 and 2.

Act of March 3, 1875, ch. 137 [§ 1], 18 Stat. 470;
Force Act, ch. 114, § 23, 16 Stat. 146 (1870);
Legislative Branch Appropriation Act, 1967, P.L. 89-545, 80 Stat. 354;
Legislative Branch Appropriation Act, 1968, P.L. 90-57, 81 Stat. 127;
Legislative Branch Appropriation Act, 1969, P.L. 90-417, 82 Stat. 398;
2 U.S.C. §§ 25, 31, 34, 35, 78, 80, 83 (1964);
28 U.S.C. §§ 1331(a), 1344, 1361, 1491, 2201-02, 2282 (1964);
31 U.S.C. § 671 (1964);
Federal Rules of Civil Procedure 19(a), 23(a)-(c).

Questions Presented

1. Whether, in a suit against Members and certain agents of the United States House of Representatives, any court may review the House's exclusion of a Member-elect pursuant to its constitutional powers to judge the qualifications of its Members and to expel a Member.

2. Assuming arguendo that any court may review such an action, whether the complaint states a claim where the action of the House (a) was based upon the unchallenged

findings that the Member-elect had been found in contempt of the processes and authority of state courts and, in his capacity as a Member of the preceding House, had wrongfully and wilfully misappropriated public funds; (b) was authorized by a vote of more than two-thirds; and (c) did not infringe any provision of the Constitution.

3. Again assuming arguendo that any court may review such an action, whether dismissal of the complaint seeking the extraordinary relief of ordering the House to reverse its judgment excluding the Member-elect was a proper exercise of discretion where that Member-elect (a) has not challenged the factual basis for the House's judgment; (b) did not present himself for admission after re-election at a special election; and (c) refused to cooperate with a committee of the House authorized to inquire into his conduct.

4. Again assuming arguendo that any court may review such an action, whether the suit should in any event be dismissed as moot where (a) the House of Representatives of the Congress from which the Member-elect was excluded is no longer in existence; and (b) the Member-elect was elected to and is now seated in the House of the succeeding Congress.

Counterstatement of the Case

This is an appeal from the Court of Appeals' affirmance of the District Court's dismissal of an action seeking declaratory, mandatory and injunctive relief against the House of Representatives of the 90th Congress and certain of its officers. The action was brought by Adam Clayton Powell, Jr., and thirteen electors of the 18th Congressional District of New York. The complaint presents for the first

time in our nation's history, a suit against a house of Congress challenging its action in excluding or expelling a member-elect. No matter how diplomatically petitioners cast their plea, the complaint seeks nothing less than a direct confrontation between the Court and the House with all the profound and disturbing implications that such a confrontation would entail.* As petitioners' counsel candidly admitted to the District Court, "Here we are suing the Legislative branch." Transcript of Proceedings before the District Court, April 4, 1967, at 204.

The Parties

In addition to Mr. Powell, petitioners are thirteen "non-white citizens of the United States and duly qualified electors of the 18th Congressional District of the state of New York . . . [who] upon information and belief voted at the general election of 1966 for plaintiff, Adam Clayton Powell, Jr." (A. 9). Petitioners purport to sue on their own behalf and "on behalf of all other persons similarly situated, pursuant to Rule 23(a). . ." (A. 8-9). Some, but not all, of the prerequisites for a class action are alleged. *See* Fed. R. Civ. P. 23(a)-(c).

Respondents McCormack and five other Members of the House are sued individually and, purportedly, "as representatives of a class of citizens who are presently serving in the 90th Congress as members of the House of Representatives" (A. 10). Speaker McCormack is also

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* Among other things, the complaint sought an order restraining the Members of the House "from taking any action to enforce House Resolution No. 278 *or any other action* which will deny to plaintiff Adam Clayton Powell, Jr., the right to be seated. . . ." (A.19) (emphasis added). [References to the record contained in the Appendix filed under Rule 36 are designated "A."]. Such an order is tantamount to directing Members of the House as to how they must vote or refrain from voting in all matters pertaining to the seating of Mr. Powell.

sued as Speaker of that House. None of the Rule 23 prerequisites of a class action is alleged with respect to the asserted class of respondents (A. 9-10).*

Respondents Jennings, Johnson and Miller—respectively the Clerk, the Sergeant-at-Arms and the Doorkeeper of the House of Representatives of the 90th Congress—are sued both individually and in their respective capacities as agents of that House (A. 10).

Proceedings in the House

During the fall of 1966, the Committee on House Administration conducted hearings with respect to alleged misuse of congressional funds and privileges by Mr. Powell and by the Committee on Education and Labor, of which he was Chairman. *See* H.R. REP. No. 2349, 89th Cong., 2d Sess. (1967). Mr. Powell was invited to testify, but did not appear. *Id.* at 5. The Committee concluded that Mr. Powell had violated House rules regarding the hiring of clerks and the use of House air travel credit cards. *Id.* at 6-7.

On January 9, 1967, the Democratic caucus voted to cause the removal of Mr. Powell as Chairman of the House Education and Labor Committee. CONG. Q., Jan. 13, 1967, at 48-49.

When the 90th Congress first assembled on January 10, 1967, Mr. Powell was asked to step aside during the ad-

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* If we are correct that the central problem here involves the voting power of each Member of the House, we believe that no Member of the House can adequately represent any other Member. Each Member's vote is his alone to cast and to defend. In our view, therefore, a class action is inappropriate and each Member of the House of the 90th Congress was an indispensable party to the action under Federal Rule of Civil Procedure 19(a). Those issues may be passed for the present, however, because we believe that the more fundamental question is whether the House or its Members as such can ever be sued.

ministration of the oath. 113 CONG. REC. H4 (daily ed. Jan. 10, 1967).

Two resolutions were then proposed and debated, with regard to his seating. *Id.* at H4, H14-16. Mr. Powell participated in that debate. *Id.* at H13.

During the debate on those resolutions, the conclusions of the Committee on House Administration were adverted to as one ground for an inquiry into what action the House should take with respect to Mr. Powell, *id.* at H5, H7, H9, H14, while another ground mentioned was Mr. Powell's contumacious attitude toward the New York courts. *Id.* at H5, H6, H8, H9, H10, H12.

In due course, House Resolution 1 was adopted. *Id.* at H16. That Resolution authorized a Select Committee to investigate and to report promptly the results of its investigation and its recommendations regarding "the right of Adam Clayton Powell to be sworn in as a Representative from the State of New York in the Ninetieth Congress, as well as his final right to a seat therein . . . ." H.R. Res. 1, 90th Cong., 1st Sess. 1 (1967) [hereinafter H.R. Res. 1]. During the interim, Mr. Powell was to receive the pay, allowances and emoluments authorized for Members, but he was not to be sworn in or permitted to occupy a seat in the House. *Id.* at 1, 2.

On February 1, the Select Committee, made up of nine lawyers headed by the Chairman of the House Judiciary Committee, invited Mr. Powell to testify on February 8 concerning his age, citizenship, inhabitancy and:

> "(1) The status of legal proceedings to which you are a party in the State of New York and in the Commonwealth of Puerto Rico, with particular reference to the instances in which you have been held in contempt of court;

"(2) Matters of your alleged official misconduct since January 3, 1961." *Hearings Before Select Committee Pursuant to H. Res. 1*, 90th Cong., 1st Sess. 2 (1967) [hereinafter *Hearings Before Select Committee*].*

The Committee advised Mr. Powell that he could be accompanied by counsel and that the hearing would be conducted in accordance with House Rule XI, paragraph 26. *Ibid.*

Prior to the hearings, the scope of the Committee's intended inquiry was discussed at a meeting of counsel for Mr. Powell and for the Committee on February 3. *Id.* at 59; REPORT OF SELECT COMMITTEE 6 n.9. On February 6, counsel for the Committee spelled out further the scope of the inquiry as to "matters of Mr. Powell's alleged official misconduct since January 3, 1961." The Chief Counsel stated by letter that:

> "[T]he Select Committee desires to interrogate Mr. Powell . . . [as to] paragraphs 1 to 11 of the 'Conclusions' contained in the Report of the Committee on House Administration, Special Subcommittee on Contracts (pp. 6 and 7) [a copy of which was enclosed] relating to an investigation into expenditures during the 89th Congress by the House Committee on Education and Labor and the clerk-hire status of Y. Marjorie Flores (Mrs. Adam C. Powell)." *Hearings Before Select Committee* 59.

On February 8, Mr. Powell, accompanied by seven attorneys, appeared at the first hearing. *Id.* at 1. At the out-

* The date of January 3, 1961, was chosen because on that date (the commencement of the 87th Congress) Mr. Powell became Chairman of the Committee on Education and Labor. SELECT COMMITTEE PURSUANT TO H. RES. 1, REPORT, 90th Cong., 1st Sess. 6 n.8 (1967) [hereinafter REPORT OF SELECT COMMITTEE].

set, Chairman Celler, without objection or comment by Mr. Powell or his attorneys, took official notice of the hearings and report of the Committee on House Administration, which included extensive conclusions regarding Mr. Powell's misuse of House funds and violation of Public Law 89-90 governing hire of clerks. *Id.* at 30.

Chairman Celler than recited the procedure governing the hearing:

> (1) Mr. Powell could be accompanied by counsel;
>
> (2) House Rule XI, paragraph 26, would apply;
>
> (3) counsel for Mr. Powell could present oral argument to the Committee; and
>
> (4) Mr. Powell could make a statement to the Committee on all matters contained in the letter of invitation to him to testify. *Id.* at 30.

Finally, Chairman Celler emphasized that the House, rather than the Committee, was the judge of Mr. Powell's qualifications. *Ibid.*

Counsel for Mr. Powell promptly moved, by brief and argument: that the Committee limit its inquiry to Mr. Powell's age, citizenship and inhabitancy; that it immediately terminate its proceedings and report that Mr. Powell was qualified; and that it grant Mr. Powell certain procedural rights.* *Id.* at 7-25, 31-54. The Committee

* The rights requested were: (1) "fair notice as to the charges now pending against him, including a statement of charges and a bill of particulars by any accuser"; (2) "the right to confront his accuser, and in particular to attend in person and by counsel all sessions of this committee at which testimony or evidence is taken, and to participate therein with full rights of cross-examination"; (3)" the right fully in every respect to open and public hearings in every respect in the proceedings before the select committee"; (4) "The right to have this committee

denied Mr. Powell's substantive motions, and with respect to his motion for certain procedural rights, Chairman Celler stated:

> "This is not an adversary proceeding. The committee is going to make every effort that a fair hearing will be afforded, and prior to this date has decided to give the Member-elect rights beyond those afforded an ordinary witness under the House rules.
>
> "The committee has put the Member-elect on notice of the matters into which it will inquire by its notice of the scope of inquiry and its invitation to appear, as well as by conferences with, and a letter from its chief counsel to the counsel for the Member-elect.
>
> "Prior to this hearing the committee decided that it would allow the Member-elect the right to an open and public hearing, and the right to a transcript of every hearing at which testimony is adduced.
>
> "The committee has decided to summon any witnesses having substantial relevant testimony to the inquiry upon the written request of the Member-elect or his counsel.
>
> "The Member-elect certainly has the right to attend all hearings at which testimony is adduced and to have counsel present at those hearings.
>
> "In all other respects, the motion is denied." *Id.* at 59.

Counsel for Mr. Powell excepted to the rulings. *Id.* at 60.

Mr. Powell then testified regarding his citizenship, inhabitancy and age, but refused to answer questions relating

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issue its process to summon witnesses whom he may use in his defense"; and (5) "the right to a transcript of every hearing". *Hearings Before Select Committee* 54.

to the other matters specified in the conclusions of the Committee on House Administration, in the debates on House Resolution 1, in the Committee's letter of February 1 and in the Committee's letter of February 6, on the *sole* ground that those matters were not within the constitutionally permissible scope of the Committee's inquiry. *Id.* at 64. At the end of the hearing of February 8, Mr. Powell asked to make a statement. Chairman Celler, denying the request at that time, invited Mr. Powell and his counsel to renew that request subsequently. *Id.* at 107. Mr. Powell never availed himself of that opportunity and did not even attend the remaining hearings.

In a letter to Mr. Powell on February 10, the Committee informed him that the next hearing would be on February 14 and invited him again to testify as to the matters referred to in the Committee's letter of February 6. *Id.* at 110. The Committee advised him that "upon the written request of you or your counsel, Select Committee will summon any witnesses having substantial relevant testimony to the inquiry being conducted by the Committee". *Ibid.* That letter also reconfirmed that Mr. Powell would be given the opportunity at the next hearing to make a statement relevant to the subject matter of the inquiry. *Ibid.*

It also stated that the five motions made at the February 8 hearing had been denied, but that decision on his motion as to whether age, inhabitancy and citizenship were the exclusive qualifications had been reserved. *Ibid.* Mr. Powell was cautioned that, whatever the Committee's decision on the last motion, it had authority, by virtue of House Resolution 1, to inquire into whether Mr. Powell should be punished or expelled as well. The Committee asked Mr. Powell to state whether he would refuse to give any testimony

concerning the status of legal proceedings to which he was a party and his alleged official misconduct since January 3, 1961, in connection with its inquiry with respect to either (a) seating or (b) punishing or expelling. *Ibid.*

On February 11, Committee Counsel wrote to counsel for Mr. Powell, enclosing copies of the Committee's letters of February 6 and 10. Committee Counsel stated that the court reporter would furnish them with a copy of the transcript of the February 8 hearing as soon as one was available. The letter also advised that subpoenas had been issued for Corrine Huff and Y. Marjorie Flores (Mrs. Adam Clayton Powell) and that if they appeared they would be questioned regarding matters referred to in paragraphs 5, 10 and 11 of the conclusions in the report of the Committee on House Administration. *Id.* at 111.

The next hearing of the Committee was on February 14. Mr. Powell did not attend, but his attorneys did. *Id.* at 109. At the opening of the hearing, counsel for Mr. Powell stated that he would refuse to testify with respect to the litigation to which he was a party and the alleged official misconduct, either in the seating phase or the punishing or expelling phase of the Committee's inquiry. *Id.* at 111-13. The Committee then heard, without objection of any kind, evidence with respect to the litigation involving Mr. Powell (*id.* at 113-72) and evidence with respect to the air travel, expense reimbursement, and bank accounts of Mr. Powell and his associates (*id.* at 172-202).

The final hearing of the Committee was on February 16. Neither Mr. Powell nor his attorneys attended. The Committee received testimony from Mrs. Adam Clayton Powell with respect to her financial affairs and those of her husband. *Id.* at 203-38. The Committee also heard testimony from a former assistant to Mr. Powell with respect to dis-

bursements for airplane travel. *Id.* at 238-54. The hearings were then closed.

At no time during the course of the hearings did Mr. Powell or his attorneys indicate in any way a desire to contest any of the factual allegations made against him. He did not renew his request for cross examination with respect to any specific witness. He did not ask the Committee to call any witness on his behalf although the Committee had expressly offered to do so. REPORT OF SELECT COMMITTEE 6. Moreover, he did not attempt to offer any evidence of any kind on these issues.

After the close of the hearings, counsel for Mr. Powell submitted another brief in support of his motions. *Id.* at 255-66. It reiterated that the Select Committee was bound to limit its inquiry to whether his election had been validated and whether he possessed what he considered to be the sole constitutional requirements for membership and stated that, "[f]or that reason, *and for that reason only,* counsel had advised Mr. Powell . . . not to participate in the hearings of the Committee which extend beyond such limitations." *Id.* at 255 (emphasis added).

On February 23, the Committee filed its report. 113 CONG. REC. H1737 (daily ed. Feb. 23, 1967). The Committee found that Mr. Powell was over 25, an inhabitant of New York and a citizen for more than seven years. The Committee also found that Mr. Powell had contemptuously ignored the processes and authority of the New York courts, had wrongfully and wilfully misappropriated public funds, had made false reports on expenditures of foreign exchange currency to the Committee on House Administration, and had been contemptuous of the House in refusing to cooperate with its committees. REPORT OF SELECT COMMITTEE 31-32. Upon those findings, the Committee recom-

mended seating, censure and a fine, his seating to be contingent on Mr. Powell's acceptance of the other conditions. *Id.* at 33.

The next day a notice that the Report would be considered by the House on March 1 was published. 113 CONG. REC. D108 (daily ed. Feb. 24, 1967).

In accordance with that notice, the House debated the Committee's Report and proposed resolution on March 1, 1967. 113 CONG. REC. H1918-54 (daily ed. Mar. 1, 1967). Mr. Powell was not present in the House—although he could have participated in the proceedings. DESCHLER, RULES OF THE HOUSE OF REPRESENTATIVES, H.R. Doc. No. 374, 88th Cong., 2d Sess. §65 (1965) [hereinafter DESCHLER]. Mr. Fulton of Pennsylvania stated, "I had hoped against hope that ADAM POWELL in the interest of his friends in this House, would appear today, to reason and to adjust, to make amends, to be heard on the past and for future plans", 113 CONG. REC. H1937 (daily ed. Mar. 1, 1967). After extended debate, during which the substantive constitutional issue—whether age, inhabitancy and citizenship are the exclusive qualifications for membership in the House—was extensively discussed, the House, by more than a two-thirds vote (307 to 116), adopted House Resolution 278. *Id.* at H1956-57.

That Resolution adopted the Committee's findings, but rejected the recommended fine and censure and instead excluded Mr. Powell from the House of the 90th Congress.*

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* On April 11, 1967, while this litigation was pending in the courts, Mr. Powell was re-elected to the House of the 90th Congress. On May 1, that House received a certificate from the New York Secretary of State formally certifying to his election. 113 CONG. REC. H4869 (daily ed. May 1, 1967). However, Mr. Powell never appeared in that House to request that he be given the oath

Court Proceedings

(1) *The District Court.* This action was commenced promptly thereafter, on March 8, 1967. The complaint sought a declaration that House Resolution 278 was unconstitutional and various forms of injunctive and mandatory relief against the Members of the House and its agents.

Very significantly, the complaint did not challenge in any way the accuracy of any of the findings in House Resolution 278.* Petitioners instead contended that the very adoption of the Resolution and the acts taken by the named respondents pursuant thereto violated the Constitution.

Petitioners claimed that the Resolution violated the rights of the electors of the 18th District, under article I, section 2 of the Constitution, to elect a representative of their choice (A. 13).

The Resolution was also alleged, as to all non-white electors of the 18th District, to violate the thirteenth amendment (A. 14); to be a deprivation of equal protection of the laws and due process of law in violation of the

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of office. The Speaker had twice made clear that if Mr. Powell should present himself, the House would consider anew whether he should be seated. 113 CONG. REC. H1942 (daily ed. Mar. 1, 1967); 113 CONG. REC. H4869 (daily ed. May 1, 1967).

* Petitioners still do not controvert those findings, although they do point out (Petitioners' Brief 105-06) [hereinafter Br.] that a subsequent grand jury investigation into Mr. Powell's conduct failed to result in an indictment. In a letter dated January 2, 1969, the then Attorney General stated that the grand jury did not return an indictment on recommendation of the Department of Justice which "was based on the conclusion that the available evidence did not warrant prosecution"; however, he went on to state that: "The Department is continuing to study the matter to determine whether there is civil liability." 115 CONG. REC. H5 (daily ed. Jan. 3, 1969).

fifth amendment (A. 14); and to be an abridgement of their rights to vote in violation of the fifteenth amendment (A. 14).

It is again very significant that, notwithstanding the aforementioned conclusional allegations that Mr. Powell's exclusion deprived non-white electors of the 18th District of their voting rights under the fifth, thirteenth and fifteenth amendments, the complaint did not set forth any facts whatsoever suggesting that Mr. Powell was excluded because of race.

On behalf of Mr. Powell, it was also alleged that House Resolution 278 constituted a bill of attainder (A. 14-15). Finally, it was said that in the hearings before the Select Committee and the debate on the Resolution, Mr. Powell was not accorded "the elemental rights of due process" in violation of the fifth amendment and that "[i]n effect, the whole proceeding amounted to a trial for infamous crimes without presentment or indictment by a Grand Jury" (A. 15).*

Next, petitioners turned to allegations regarding the manner in which certain specific respondents, including non-members of the House, allegedly violated the Constitution. Those alleged violations are presumably claimed to be wrongs as to all petitioners.

Speaker McCormack was alleged to have violated the fifth amendment in declaring the seat of the 18th Congressional District vacant, in notifying the Governor of New York of that vacancy, and "in causing the City of

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* The complaint also alleged that the action of the House violated the sixth amendment (A. 5), the prohibition against ex post facto laws (A. 14-15), the prohibition against cruel and unusual punishment (A. 15), and the ninth, tenth, and nineteenth amendments (A. 14, 17). Petitioners have apparently abandoned those contentions in this Court.

New York to undergo the expense of $100,000 to hold a special election" (A. 15). It was further alleged that Speaker McCormack had wrongfully refused and threatened to continue to refuse to administer the oath to Mr. Powell (A. 16). It was finally alleged that Speaker McCormack wrongfully threatened to exclude Mr. Powell from occupying his office in the House Office Building and to deprive him of the emoluments and privileges of office (A. 16).

Certain charges were also made against the Clerk, the Sergeant-at-Arms and the Doorkeeper, who as officers of the House had the responsibility to implement House Resolution 278. Those officers were alleged to have violated the Constitution and laws of the United States by respectively refusing to perform services and duties for Mr. Powell, refusing to pay Mr. Powell's salary and refusing to admit Mr. Powell to the floor of the House as the duly elected representative of the 18th Congressional District (A. 16-17).

Petitioners sought by injunction, mandamus or declaratory judgment to prevent respondents "from taking any action to enforce House Resolution No. 278 or any other action which will deny to plaintiff Adam Clayton Powell, Jr. the right to be seated . . ." (A. 19) and to compel respondents to seat Mr. Powell and to accord him the privileges and emoluments of office. Such an order would forbid the Members of the House from voting, or direct them to vote, in a particular way on matters relating to the seating of Mr. Powell (A. 18-21).

The District Court, on April 7, entered an order dismissing the complaint for lack of subject-matter jurisdiction (A. 36). The Court also denied petitioners' request to convene a three-judge court and their motion for a preliminary injunction (A. 36).

(2) *The Court of Appeals.* On the same day, petitioners filed a notice of appeal (A. 37), and on April 10, they moved for summary reversal (A. 38). After hearing oral argument, the Court of Appeals denied that motion on April 27 (A. 39). On May 13, petitioners filed in this Court a petition for a writ of certiorari prior to judgment in the Court of Appeals, which was denied on May 29, 387 U.S. 933.

On February 27, 1968, the Court of Appeals entered a judgment unanimously affirming the District Court's dismissal of the complaint (A. 104). The court held that there was subject-matter jurisdiction (A. 58-65, 93, 95), but that the case was not appropriate for judicial consideration for a variety of reasons. Judges Burger and McGowan held that the case presented a nonjusticiable political question (A. 66-78, 92-93 n.3), while Judge Leventhal found it unnecessary to reach the point (A. 95). Judges Burger and Leventhal recognized, without deciding, that the Speech or Debate Clause was an additional bar to the maintenance of this action (A. 79-84, 96), while Judge McGowan did not pass on the question (A. 91 n. 1). Finally, the court, recognizing that the relief requested was in any event discretionary, concluded that it was not an abuse of discretion for the District Court to decline to proceed (A. 74-76, 93-94 n.4, 95).

Events Subsequent to This Court's Granting of Certiorari

On November 18, 1968, this Court granted petitioners' petition for certiorari, which was filed on May 28, 1968, the 90th day following the entry of the judgment of the Court of Appeals. Respondents had opposed the granting of certiorari on the ground, among others, that in view of the then imminent adjournment of the 90th Congress, the issues raised in the petition might well become moot before

they could be fully briefed and considered. Memorandum in Opposition 13-15.

Since the granting of certiorari, two significant events have occurred. On January 3, 1969, the House of Representatives of the 90th Congress, against whom this action was brought, officially terminated, and a new House, of the 91st Congress, was convened and organized. Also on that day, Mr. Powell presented himself for membership in the 91st Congress and was seated. 115 CONG. REC. H22 (daily ed. Jan. 3, 1969).* In view of these events, respondents filed their memorandum suggesting that this action should be dismissed as moot [hereinafter Respondents' Memorandum on Mootness]. On January 27, 1969, this Court postponed further consideration of this suggestion of mootness until argument of the case on the merits.

Summary of Argument

Separation of powers among the judicial, legislative and executive branches is the basis of our federal government. The proper and legitimate functioning of that government requires that each house of the legislative branch be free from interference by the other branches in the governance of its internal affairs. That freedom was wrung by historic struggle from the Tudor and Stuart monarchs and their courts and is encapsulated with this historic gloss in our Constitution, where it now is safeguarded by the Speech or Debate, Power to Judge Qualifications, Power to Punish and Expel, and Freedom from Arrest Clauses of article I.

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* The resolution seating him also provided as punishment for a fine of $25,000 and for his seniority to commence as of the day he took the oath of office. It did not, however, make his seating conditional on either of those matters. *See* H.R. Res. 2, 115 CONG. REC. H21 (daily ed. Jan. 3, 1969).

Numerous authorities make clear that those specific constitutional provisions and the historic principles they embody require dismissal of this action and foreclose any judicial inquiry into the decision of the House to exclude Mr. Powell. The House of Representatives is part of an equal and coordinate branch. The decisions it makes pursuant to its exclusive power under article I, whether right or wrong, must command the same respect from the other branches as do the decisions of this Court acting within the scope of its powers under article III. In short, the propriety of what the House did in this case was for the House, and the House alone, to decide.

I. We submit, therefore, that both courts below properly refused to entertain this action:

First. Article I, section 6, clause 1 of the Constitution, the Speech or Debate Clause, bars any court from questioning Members of the House of Representatives with respect to actions taken by them in connection with legitimate legislative activities such as exercise of their constitutional power to judge the qualifications of a Member-elect or to punish or expel a Member. That Clause protects Members both from the consequences of a judgment in any litigation and from the burden of defending themselves in court. *Dombrowski* v. *Eastland*, 387 U.S. 82. That constitutional immunity, like its English and American colonial precedents, has the broad purpose of protecting the integrity and independence of each house of the federal legislative branch and the branch as a whole from any interference by the executive or judicial branches of the federal government. The suit against agents of the House to bar them from implementing within the House the Members' exercise of their independent constitutional prerogatives is but a transparent effort

to frustrate the broad immunity afforded by the Clause and may not be countenanced.

Second. The power to judge qualifications of a Member and the power to expel a Member upon the concurrence of two-thirds are exclusively committed to the House and its Members by article I of the Constitution and may not be reviewed in any manner by a court acting under article III. The power of the House to judge qualifications as well as the power to punish or expel, like the power of the Senate to render a judgment of impeachment, "is beyond the authority of any other tribunal to review". *Barry* v. *United States ex rel. Cunningham,* 279 U.S. 597, 613. The British precedents, as well as the colonial and early state practice in this country, vested the exclusive power to judge qualifications and to punish or expel in the legislature and denied it to the courts. That precedent and practice were reflected in the broad grant of adjudicatory authority to the House in article I and in the clearly intended exclusion of such power from the definition of the judicial power of this Court in article III. Moreover, even if article III were construed to permit Congress to create federal court jurisdiction over this subject, there is no statute granting such jurisdiction. Indeed, the only section of the Judicial Code creating any federal court jurisdiction with respect to the right of a person to a public office—28 U.S.C. § 1344 (1964)—specifically precludes jurisdiction in a case involving a United States Senator or Representative in Congress. *Johnson* v. *Stevenson,* 170 F.2d 108 (5th Cir. 1948), *cert. denied,* 336 U.S. 904.

Third. The complaint also represents an impermissible attempt to involve the federal courts in decision of a nonjusticiable political question. Many of the cri-

teria stated by this Court in *Baker* v. *Carr*, 369 U.S. 186, for identifying such a political question are present here. As indicated, article I, section 5 affirmatively commits to each house of the legislative branch power to judge qualifications of members and to punish or expel them. Moreover, the prohibitions erected by the Speech or Debate Clause against questioning of members and the Privilege from Arrest Clause bar effective enforcement of any court order against members with respect to a judgment excluding or expelling a member-elect. In addition, resolution of the controversy would not be possible "without expressing lack of the respect due coordinate branches of government." 369 U.S. at 217. All those factors emphasize the existence of a classic political question which is nonjusticiable.

The nonjusticiability of this action is most clearly exposed by the inability of any court to grant the relief originally sought. Neither injunction nor mandamus would have been available against the Members of the House or its agents with respect to official action within the House. *See Mississippi* v. *Johnson*, 4 Wall. 475; *Pauling* v. *Eastland*, 288 F.2d 126 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 900; *Hearst* v. *Black*, 87 F.2d 68 (D.C. Cir. 1936); *Methodist Federation* v. *Eastland*, 141 F. Supp. 729 (D.D.C. 1956). An injunction action would not lie because the remedy would be unenforceable; mandamus would be unavailable because there was no ministerial duty which could be fairly separated from the discretionary act of the House and its Members in the exercise of its power to judge qualifications and to punish or expel. *Compare Marbury* v. *Madison*, 1 Cranch 137, 170, *with Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318. The declaratory judgment remedy originally sought would be inappropri-

ate because, there being no possibility of injunctive or mandatory relief, such a judgment would be an impermissible advisory opinion. *Pauling* v. *Eastland, supra.* Moreover, to the extent that such a declaratory judgment would be coercive, it would be barred by the Speech or Debate Clause. In addition, the declaratory judgment is procedural only and does not enlarge or alter the jurisdiction of the federal courts. That being so, it is subject to the same jurisdictional infirmities that pervade petitioners' other claims for relief.

II. Even if this Court or any other court could properly review the action of the House in this case—which we submit it cannot—the dismissal of the complaint must nevertheless be affirmed. Petitioners fail to state a claim on the merits for the following reasons:

First. The House acted within its constitutional power in excluding Mr. Powell based on its uncontested findings that he had been contemptuous of the New York courts and had wrongfully misappropriated public funds while a Member. The power of the House was exercised in accordance with the practice of the House of Commons in England, the colonial legislatures, and the early American states. The Framers clearly intended to incorporate that practice in our Constitution. In this regard, a distinction must be made between: (a) the power of Congress to pass statutes creating "standing incapacities" (*i.e.*, general categories of status with prospective and universal application) in addition to those specified in the Constitution and (b) the power of either house, in judging the qualifications of its members, to exclude particular individuals as unfit for reasons of personal misconduct,

such as those set forth in House Resolution 278. Only the former is prohibited by the Constitution. There have been many occasions on which the House and Senate, as well as this Court, have recognized the power to exclude or expel under the latter circumstances.

Second. The power of the House to expel a Member upon a two-thirds vote "extends to all cases where the offense is such as in the judgment of the Senate [or House] is inconsistent with the trust and duty of a Member". *In re Chapman,* 166 U.S. 661, 669-70. House Resolution 278 finding that Mr. Powell had committed various acts of misconduct and denying him a seat was passed by more than a two-thirds vote and thus is equally supported by the House's power to expel.

Third. The action of the House did not impinge upon any rights petitioners may have had under other provisions of the Constitution. The action did not constitute a denial of due process of law, punishment by bill of attainder or denial of equal protection of the laws because of race.

III. Furthermore, all of the relief which petitioners are seeking in this action was properly withheld as a matter of sound judicial discretion. In the circumstances of this case—including the failure of Mr. Powell to invoke remedies and procedures available within the legislative branch both before and after his re-election on April 11, 1967; the unchallenged evidence of misconduct on his part; and the confrontation between the courts and the House posed by the relief requested—it was not an abuse of discretion for the courts below to decline to proceed.

IV. Finally, although we urge affirmance of the dismissal below as an appropriate termination of this con-

troversy, this case may also be dismissed as moot because, in any event, the relief requested is academic and cannot be granted in the present posture of this case. The 90th Congress is now history, and Mr. Powell is seated in the 91st Congress. Whatever rights Mr. Powell may have with respect to his claim for back salary, they cannot be asserted in a suit against the Sergeant-at-Arms, who is authorized by statute only to pay Members-elect in certain limited circumstances not relevant here and otherwise only to pay Members who had taken the oath. The action of the House of the 91st Congress in fining Mr. Powell $25,000 as punishment in the exercise of its express power to punish is not before this Court and cannot be brought before it at this stage of these proceedings.

Argument

POINT I

The Federal Courts Lack the Constitutional Power and Competence To Review the Judgment of the House of Representatives of the 90th Congress To Exclude Mr. Powell.

Neither this Court nor any other court may properly review the action of the House in excluding Mr. Powell. That conclusion follows inexorably from the long Anglo-American history of the struggle for legislative independence and the culmination of that history in an amalgam of provisions contained in article I of the Constitution—the Speech or Debate Clause, the Power to Judge the Qualifications of a Member, the Power to Punish and to Expel a Member and the Privilege from Arrest Clause.

A. *The Speech or Debate Clause Is an Absolute Bar to This Action.*

This is an action against the House of Representatives. The named defendants are sued in their capacities as Members, both as individuals and as representatives of the entire class of Members (A. 10).

At the threshold, article I, section 6, clause 1 of the Constitution expressly bars this Court or any other court from "questioning" the action of the respondent Members, or their agents, which is challenged by the complaint. That provision, the so-called "Speech or Debate Clause", broadly provides:

> "[F]or any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other Place."

That Clause underscores and enforces the separation of powers doctrine embedded in the Constitution and relied upon by the District Court.*

This is made abundantly clear from four centuries of English and American history as well as from this Court's four interpretations of the Speech or Debate Clause. *Dombrowski* v. *Eastland,* 387 U.S. 82; *United States* v. *Johnson,* 383 U.S. 169; *Tenney* v. *Brandhove,* 341 U.S. 367; *Kilbourn* v. *Thompson,* 103 U.S. 168. In all of those cases, this Court held that there was immunity

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* That the Speech or Debate Clause bars this action was recognized by Judge Burger in the court below, although he did not rest his decision on that point (A. 84, 102). Judge McGowan did not find it necessary expressly to rely upon the Clause (A. 91 n.1). Judge Leventhal, on the other hand, while not joining in Judge Burger's opinion on the point (A. 95), in effect thought that the Clause would apply (A. 96 n.2).

even when only one or two members were involved. This case is a fortiori since the whole House itself is here sued.*

In the most recent of these cases, this Court held:

> "It is the purpose and office of the doctrine of legislative immunity, having its roots as it does in the Speech or Debate Clause of the Constitution, *Kilbourn* v. *Thompson,* 103 U.S. 168, 204 (1881), that legislators engaged 'in the sphere of legitimate legislative activity,' *Tenney* v. *Brandhove, supra,* 341 U.S. at 376, should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski* v. *Eastland,* 387 U.S. at 84-85.

The last point was emphasized in *Dombrowski,* for, as this Court had earlier said, "the privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney* v. *Brandhove,* 341 U.S. at 377.

The decision in *Dombrowski* is but the most recent affirmation of this Court's first decision involving the Clause, nearly 90 years ago in *Kilbourn.* The broad coverage of the Speech or Debate Clause was there made very clear:

> "It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its com-

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* Compare the analogous immunity enjoyed by the judiciary in order to perform their functions without fear of the consequences. *Pierson* v. *Ray,* 386 U.S. 547.

mittees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. *In short, to things generally done in a session of the House by one of its members in relation to the business before it.*" 103 U.S. at 204 (emphasis added).*

Petitioners raise a number of objections to application of the Speech or Debate Clause here.

First, they seem to imply that the debate and voting in the House which culminated in House Resolution 278 somehow did not constitute "legitimate" legislative activity and therefore are not protected by the Speech or Debate Clause (Br. 171).

Such a suggestion is foreclosed by this Court's earlier decisions. "Legitimate legislative activity" has been held by this Court to encompass activity which results in clear violation of a criminal statute, *United States* v. *Johnson;* alleged activity by state legislators which deprived a private citizen of his right to freedom of speech under the first amendment, *Tenney* v. *Brandhove;*** alleged unlawful and unconstitutional seizure of private property, *Dombrowski* v. *Eastland;* and even the passage of a resolution

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* The language of the clause in the seminal English Bill of Rights fully sustains this broad reading: "That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament". 1 COSTIN & WATSON, THE LAW AND WORKING OF THE CONSTITUTION: DOCUMENTS 1660-1914, at 67, 68-70 (1952).

** We are aware that the precise holding in *Tenney* v. *Brandhove* as to the power of the federal judiciary to entertain suits against state legislators may require reexamination in light of *Bond* v. *Floyd,* 385 U.S. 116. The rationale of *Tenney* as applied to the federal legislature, however, has continuing vitality. *See Dombrowski* v. *Eastland, supra.*

directing an illegal and unconstitutional incarceration of a private individual, *Kilbourn* v. *Thompson*. In short, "legitimate legislative activity" refers, not to the objective or motivation of legislative activity, but to the activity itself: conducting investigations and hearings, debating and passing resolutions, judging the qualifications and punishing the conduct of its members.

Since such conduct, even when it involves actions that are in excess of the legislative power, has nevertheless been held to be within the sphere of legitimate legislative activity, it follows a fortiori that the Members sued here cannot be called into question for speaking to and voting on a resolution passed pursuant to an explicit constitutional commitment to the House of the power to judge the qualifications of its Members and to punish or expel a Member. Thus, even if the House's exercise of those powers resulted in an action that is assumed to be wholly unwarranted and ill-considered, the Speech or Debate Clause precludes judicial interference with and questioning of that decision.

There is no need now to decide whether the Speech or Debate Clause is an absolute bar to any judicial proceeding against the Members of the House for any kind of purported legislative activity within the House, no matter how heinous. As the Court said in *Kilbourn* v. *Thompson*:

> "It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible. If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief

> Magistrate of the nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment, we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate. In this, as in other matters which have been pressed on our attention, we prefer to decide only what is necessary to the case in hand . . ." 103 U.S. at 204-05.

No such case of "utter perversion" has ever been presented to any article III court, and no such case is presented here.* Here, following the practice of the colonial legislatures and its own established precedents (*see* pp. 70-90 *infra*), the House has acted solely on grounds of personal misconduct. Accordingly, we respectfully submit that the Court should "decide only what is necessary to the case in hand", and uphold respondents' plea that the Speech or Debate Clause is a bar in the particular circumstances of this proceeding.

Second, petitioners ask this Court to question the Members of the House as to their unstated motivations in passing House Resolution 278. Although they must necessarily recognize that the express grounds for Mr. Powell's exclusion were his conduct, not his race, petitioners assert in their brief, but not in their complaint, that the exclusion of Mr. Powell "was at least in substantial part

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* Even if it is assumed that the bar of the Speech or Debate Clause can ever be breached because the legislators engaged in an "utter perversion of their powers", it appears settled that unconstitutional action—even action which infringes individual personal freedoms guaranteed by the Bill of Rights—is not sufficient to pierce the bar of the Clause. *Kilbourn* itself, as well as *Tenney* and *Dombrowski,* teach that the Clause protects actions which directly, materially, and in violation of constitutional command, abridge personal liberties.

based upon reasons of race" (Br. 120). But the charge that the "conduct was improperly motivated . . . is precisely what the Speech or Debate Clause generally forecloses from executive or judicial inquiry." *United States* v. *Johnson*, 383 U.S. at 180; *cf. United States* v. *O'Brien*, 391 U.S. 367, 382-86. As Mr. Justice Frankfurter stated in *Tenney* v. *Brandhove*,

> "The holding of this Court in Fletcher v. Peck, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. See cases cited in Arizona v. California, 283 U.S. 423, 455." 341 U.S. at 377.

Accordingly, petitioners' argument that House Resolution 278 must be appraised in light of the alleged improper motivations of the Members simply reinforces the conclusion that the "prophylactic purpose of the clause", *United States* v. *Johnson*, 383 U.S. at 182, can only be effectuated by affirming the dismissal of the complaint without further inquiry.

Third, although petitioners recognize that the Speech or Debate Clause bars the imposition of "criminal or civil sanctions of a deterrent nature" against legislators for their participation in "legitimate legislative activity", they seem to suggest that the Clause is impotent to shield legislators from the types of relief sought by the complaint (Br. 171).

Petitioners originally sought injunctive or mandatory relief directed against the Members. This form of relief is also barred by the Speech or Debate Clause, for the Clause is cast, not in terms of insulating members from liability for their acts, which would have been sufficient to protect them from the threat of civil damages or crim-

inal sanctions, but rather in broad language which precludes their being "questioned" about performance of their duties, or being proceeded against or placed under judicial compulsion of any kind to perform those duties in some other way.

The principal purpose of the Speech or Debate Clause is the "protection of the independence and integrity of the legislature" from encroachments by executives (or judges) who "utilized the criminal and civil law to suppress and intimidate critical legislators." *United States* v. *Johnson*, 383 U.S. at 178. In order to effectuate that purpose, the Clause must apply to bar injunctive and mandatory relief, for it is far simpler to suppress and intimidate critical legislators by direct order of a court of equity, with its attendant sanctions, than by the indirect threat of civil or criminal liability which is after the fact and which must be imposed by a jury.* *See Stamler* v. *Willis*, 287 F. Supp. 734, 738-39 (N.D. Ill. 1968), *vacated and remanded on other grounds*, 89 S. Ct. 677.

Petitioners do not overcome the defects of their prayer for injunctive or mandatory relief against the Members by now limiting their prayer to one for declaratory relief. *See* Memorandum for Petitioners in Opposition to Respondents' Memorandum Suggesting That This Action Should Be Dismissed As Moot 16 [hereinafter Petitioners' Memorandum]. Wholly apart from the consideration that declaratory judgment relief is not available in the pres-

* The application of the Speech or Debate Clause as a bar to injunctions against Members of the House is corroborated, not only by the general principle of separation of powers, but also by article I, section 6, clause 2 of the Constitution, which proscribes the arrest of a Member for contempt on account of a violation of any such injunction while attending or going to and from a session of the House. It may also be noted that in *Dombrowski*, the complaint dismissed as to Senator Eastland included a prayer for an injunction. *See* 358 F.2d 821, 822-23 (D.C. Cir. 1966).

ent posture of this case (*see* pp. 112-13 *infra*), it has long been recognized that declaratory relief will not lie where suit for an injunction is barred by the separation of powers. *Pauling* v. *Eastland*, 288 F.2d 126 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 900; *accord, Fischler* v. *McCarthy*, 117 F. Supp. 643, 649-50 (S.D.N.Y.), *aff'd on other grounds*, 218 F.2d 164 (2d Cir. 1954); *Randolph* v. *Willis*, 220 F. Supp. 355, 360 (S.D. Cal. 1963). *See also Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127-28; *Pauling* v. *McNamara*, 331 F.2d 796 (D.C. Cir. 1963) *cert. denied*, 377 U.S. 933; *Goldstein* v. *Johnson*, 184 F.2d 342 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 879; *United States ex rel. Jordan* v. *Ickes*, 143 F.2d 152 (D.C. Cir. 1944), *cert. denied*, 320 U.S. 801; *Doehler Metal Furniture Co.* v. *Warren*, 129 F.2d 43 (D.C. Cir. 1942), *cert. denied*, 317 U.S. 663. Unless any declaratory judgment were to be a wholly gratuitous and useless act, it must rely for its efficacy upon the willingness of the Members to acquiesce in this Court's interpretation of the House's action. Thus, in so far as a declaratory judgment would be given force and effect by the Members' voluntary acquiescence, it "would be as effective an impingement upon and interference with legislative proceedings as a flat injunction would be", *Pauling* v. *Eastland*, 288 F.2d at 130.

It is apparent that the granting of the declaratory relief requested against the Members of the House would require the very thing which the Clause specifically interdicts, *i.e.*, questioning of the Members in the most direct manner, and would ignore both the "presuppositions of our political history", *Tenney* v. *Brandhove*, 341 U.S. at 372; *accord, United States* v. *Johnson*, 383 U.S. at 182-83, and the "prophylactic purposes of the clause", *id.* at 182, particularly in light of petitioners' suggestions of improper motivation.

Fourth and finally, petitioners suggest that "the immunity of the clause, whatever its scope, does not attach" to the non-member respondents, against whom they also seek relief (Br. 171). But, as this Court has recently pointed out, the doctrine is "applicable, when applied to officers or employees of a legislative body", even though it is "less absolute". *Dombrowski* v. *Eastland,* 387 U.S. at 85.

In each instance where this Court has upheld the maintenance of an action against an agent of the House in spite of the protection afforded by the Speech or Debate Clause, it has been with respect to some unlawful affirmative act performed outside the House which had a direct effect upon a private citizen. Thus, in *Kilbourn* v. *Thompson, supra,* the Sergeant-at-Arms was charged with having arrested a non-member outside the House. In *Dombrowski* v. *Eastland, supra,* counsel to a congressional subcommittee was alleged to have participated in a conspiracy with state officials in Louisiana to seize unlawfully a non-member's property. But the relief sought here relates solely to actions taken by the House, within the House, in the exercise of its express power to judge the qualifications of its Members, and to punish or expel them. The circumstances here are not even remotely similar to those in which agents of the House have been held subject to liability notwithstanding the Speech or Debate Clause. Moreover, a judgment against an officer or agent of the House would require him to perform an affirmative act which the House has expressly prohibited. In practical, as well as legal, effect, it would be identical to granting the same relief against the House itself.

The argument that an agent of the legislature could be compelled to seat a member-elect was persuasively disposed of by Lord Coleridge in *Bradlaugh* v. *Gossett,* 12 Q.B.D. 271, 276 (1884):

> "I need not discuss at any length the fact that the defendant in this case is the Serjeant-at-arms. The Houses of Parliament cannot act by themselves in a body: they must act by officers; and the Serjeant-at-arms is the legal and recognised officer of the House of Commons to execute its orders. I entertain no doubt that the House had a right to decide on the subject-matter, have decided it, and have ordered their officer to give effect to their decision. He is protected by their decision. They have ordered him to do what they have a right to order, and he has obeyed them."

In the final analysis, the entry of any order against the non-members in this case, relating solely to their actions within the House pursuant to express orders of the House, would violate the immunity conferred upon the Members by the Speech or Debate Clause.

B. *None of the Prerequisites for Subject-Matter Jurisdiction Is Present in This Case.*

Even if there were no Speech or Debate Clause in our Constitution, the courts would be barred from proceeding because they lack jurisdiction over the subject-matter of this action. For the adjudicatory power over the subject matter of this action is delegated to the House by article I and not to the courts by article III. Thus, to ask this Court to decide this case is to ask it to transgress the separation of powers between the judicial and legislative branches of government.*

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* We recognize that the Court of Appeals held that it did have such jurisdiction. Although doubts were expressed, the matter was deemed foreclosed by *Baker* v. *Carr*, 369 U.S. 186, and *Bond* v. *Floyd*, 385 U.S. 116. As we shall point out, those cases do not control. The Court of Appeals nevertheless declined to exercise subject-matter jurisdiction on a variety of grounds that we believe are fully supportable. *See* Points I C, II B and III.

There are at least three separate criteria, all of which must be satisfied, for federal subject-matter jurisdiction. Those criteria, stated negatively by this Court, are that:

> (1) "the cause . . . does not 'arise under' the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, §2)"; *or*
>
> (2) it "is not a 'case or controversy' within the meaning of that section;" *or*
>
> (3) "the cause is not one described by any jurisdictional statute." *Baker* v. *Carr*, 369 U.S. 186, 198.

Not one of those criteria is satisfied here:

1. *The Powers To Judge the Qualifications of Members and To Exclude or Expel a Member Are Conferred Exclusively on Each House of Congress by Article I, Section 5, and Not on the Courts by Article III.*

Article III vests "the judicial Power of the United States" in this Court and in such inferior courts as the Congress may establish. But all adjudicatory power is not thereby assigned to the courts. Under article I, section 5, each house is "the *Judge* of the Elections, Returns and Qualifications of its own Members" (emphasis added); under the same provision each house also has the power "to punish" its members for disorderly behavior and, with the concurrence of two-thirds, the power "to expel" a member; and under section 3 of article I the Senate is given "the sole Power to try all Impeachments." * Thus, in at

* While impeachment proceedings are rare, the Senate has decided what governmental offices properly subject their holders to impeachment (the offices of Senator and Representative do not), what offenses can be tried by impeachment, and whether a trial can

least four instances—all dealing variously with the right to hold office in the legislative, executive, or judicial branches —adjudicatory power is assigned to the legislative branch, and since that branch is co-equal with the other branches, the judgments it makes are exclusive and supreme. Each of these delegations of judicial power under article I is thus an "explicit exception to the general grant of judicial power to the courts under Article III." Scharpf, *Judicial Review and the Political Question: A Functional Analysis,* 75 YALE L. J. 517, 540 (1966).

Two provisions of article I are involved here.

First, the action of the House in excluding Mr. Powell was taken pursuant to the House's express constitutional power to judge the qualifications of its Members.

Second, the exclusion of Mr. Powell from the House of Representatives of the 90th Congress was a decision equally supported by the House's express constitutional power, upon a two-thirds vote, to expel a Member.

Traditionally legislative bodies in England and this country have regarded the exercise of these powers to be theirs exclusively, and not the prerogatives of the courts. This Court as well as others has concurred. In *Barry* v. *United States ex rel. Cunningham,* 279 U.S. 597, 613, for example, this Court in a unanimous opinion stated that

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be had notwithstanding a prior resignation by the office holder. *See, e.g., William Blount,* 5th Cong., 1st Sess. (1797), SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS, SENATE COMMITTEE ON RULES AND ADMINISTRATION, SENATE ELECTION, EXPULSION AND CENSURE CASES, S. Doc. No. 71, 87th Cong., 2d Sess. 3 (1962) [hereinafter SENATE CASES]. Surely the Senate's decisions, whether right or wrong, cannot be reviewed by any court. *See* Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 8 (1959).

"[e]xercise of the power [to judge the qualifications] necessarily involves . . . the power . . . to render a judgment which is beyond the authority of any other tribunal to review." And in *Baker* v. *Carr,* Mr. Justice Douglas, concurring, noted, "[O]f course, each House of Congress, *not the Court,* is 'the Judge, of the Elections, Returns, and Qualifications of its own Members.'" 369 U.S. at 242 n.2 (emphasis added). *See also Reed* v. *County Comm'rs,* 277 U.S. 376, 388; *Jones* v. *Montague,* 194 U.S. 147, 153; *In re Chapman,* 166 U.S. 661, 668-70.

The same conclusion has been reached by a number of lower courts, two of which deserve special comment. In *Sevilla* v. *Elizalde,* 112 F.2d 29 (D.C. Cir. 1940), the court was asked to determine whether a territorial commissioner possessed the requisite qualifications for holding office and, if he did not, to enjoin him from sitting (without vote) in the United States House of Representatives because his appointment had not been made in the manner required by law. In concluding that the matter in issue was beyond its jurisdiction, the court of appeals squarely held:

> "We think it clear also that the courts have no authority to pass upon the qualifications of a delegate from a territory. Article I, section 5 of the Constitution provides that 'each house shall be the judge of the elections, returns, and qualifications of its own members. . . .' And the Supreme Court has recognized that although these powers are judicial, as distinguished from legislative or executive, in type, they have nevertheless been lodged in the legislative branch by the Constitution." *Id.* at 37.

In *In re Voorhis,* 291 F. 673 (S.D.N.Y. 1923), Judge Learned Hand refused to quash a House subpoena issued to a state board of elections in connection with a contested election

proceeding in the House, holding that the court lacked subject-matter jurisdiction. Judge Hand said,

> "[t]he House is the exclusive judge of the elections, returns and qualifications of its own members.' Assuming that the ancillary power to perpetuate testimony must have the sanction of Congress, clearly it is the House alone which must on the contest, as a court, determine whether the procedure so created has been regularly followed. Consider the effect of a contrary notion. I am invited here to declare that the notice given under section 105 is insufficient. This is the only reason urged by the petitioner for quashing the subpoena. *But that question is justiciable by the House, and by the House alone. Suppose I were to take sides with the petitioner, and my decision were affirmed by the Circuit Court of Appeals, or perhaps by the Supreme Court on certiorari? Is the House to yield to that decision? Clearly not; the Constitution has put that matter exclusively in its own hands.*" *Id.* at 675 (emphasis added).

Accord, Manion v. *Holzman,* 379 F.2d 843, 845 (7th Cir. 1967), *cert. denied,* 389 U.S. 976; *Johnson* v. *Stevenson,* 170 F.2d 108 (5th Cir. 1948), *cert. denied,* 336 U.S. 904; *Seymour* v. *United States,* 77 F.2d 577, 579-80 (8th Cir. 1935); *Application of James,* 241 F. Supp. 858, 860 (S.D.N.Y. 1965) ("the federal courts have no jurisdiction to pass on the qualifications . . . of any member of the House of Representatives"); *Peterson* v. *Sears,* 238 F. Supp. 12 (N.D. Iowa 1964); *Keogh v. Horner,* 8 F. Supp. 933, 935 (S.D. Ill. 1934) ("the power of the respective Houses of Congress with reference to the qualifications . . . of its members is supreme"); *Rankin* v. *Cenarrusa,* Civ. No. 39700 (Idaho Dist. Ct. Sept. 28, 1967).

The conclusion of many commentators is the same. *See* COOLEY, CONSTITUTIONAL LIMITATIONS 189-90 (7th ed. 1903); 1 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 831-33 (4th ed. Cooley 1873); Frank, *Political Questions*, in SUPREME COURT AND SUPREME LAW 36 (Cahn ed. 1954); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L. J. 517, 540 (1966); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 8 (1959); Note, *The Political Question Doctrine and Adam Clayton Powell*, 31 ALBANY L. REV. 320, 335 (1967); Note, *The Legislature's Power To Judge the Qualifications of Its Members*, 19 VAND. L. REV. 1410-12 (1966).

The conclusion reached by all these authorities is not rebutted by petitioners' argument that this case involves important constitutional questions. This is an action against the House in which petitioners attack its exercise of an adjudicatory power expressly conferred by article I. The power conferred on the courts by article III does not authorize this Court to do anything more than declare its lack of jurisdiction to proceed. Those cases in which this Court has found federal subject-matter jurisdiction because they involved important questions "arising under the Constitution" are not determinative here, since none of them involved the express delegation of judicial power to the houses of Congress by article I.*

This is particularly true of *Baker* v. *Carr*, *supra*, and *Bond* v. *Floyd*, 385 U.S. 116, which were relied upon below

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* *See, e.g., Baker* v. *Carr*, 369 U.S. at 198; *Bell* v. *Hood*, 327 U.S. 678; *Hart* v. *B. F. Keith Vaudeville Exch.*, 262 U.S. 271, 274; *Newburyport Water Co.* v. *Newburyport*, 193 U.S. 561, 579. *See generally* WRIGHT, FEDERAL COURTS 48-52 (1963); Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 649 (1942); Mishkin, *'The Political Question' in the District Courts*, 53 COLUM. L. REV. 157, 165-68 (1953).

as foreclosing the question of subject-matter jurisdiction. In those cases, this Court was not presented with a question of the allocation of federal adjudicatory power as between the legislative branch under article I and the judicial branch under III. Both simply involved unconstitutional state action which this Court had the power to review under the Supremacy Clause. And it is not to be assumed that those cases decided sub silentio the question of subject-matter jurisdiction presented here, since the Court has only recently emphasized the complexities involved in determining whether subject-matter jurisdiction exists. *Flast* v. *Cohen,* 392 U.S. 83.

Nor should the House's freedom from judicial review cause concern that the House might unreasonably or erroneously exercise its judicial powers. Members of the House (and Senators), like the Justices of this Court, take an oath to support the Constitution (U.S. CONST. art. VI, cl. 3) and it cannot be presumed that they will violate that oath. There is always a risk of error—even of constitutional error—on the part of each branch of the Government in the areas in which it is granted supreme constitutional competence. But this is not a weakness of our system of government; it is one of its strengths. As Judge Burger noted below:

> "That each branch may thus occasionally make errors for which there may be no effective remedy is one of the prices we pay for this independence, this separateness, of each co-equal branch and for the desired supremacy of each within its own assigned sphere. When the focus is on the particular acts of one branch, it is not difficult to conjure the parade of horrors which can flow from unreviewable power. Inevitably, in a case with large consequences and a paucity of legal precedents, the advocates tend to raise the spectre of the

hypothetical situations which would be permitted by the result they oppose. Our history shows scant evidence that such dire predictions eventuate and the occasional departures in each branch have been thought more tolerable than any alternatives that would give any one branch domination over another. That courts encounter some problems of which they can supply no solution is not invariably an occasion for regret or concern; this is an essential limitation in a system of divided powers. That courts cannot *compel* the acts sought to be ordered in this case recedes into relative insignificance alongside the blow to representative government were they either so rash or so sure of their infallibility as to think they should command an elected co-equal branch in these circumstances" (A. 89-90) (emphasis in original).

Moreover, as Professor Chafee has observed: "It is no answer [to the lack of judicial review] to say that if the House of Representatives should exclude a man on some whimsical ground, no appeal would lie from its action. Neither is there any appeal from the Supreme Court." CHAFEE, FREE SPEECH IN THE UNITED STATES 253 (1941) [hereinafter CHAFEE].* Likewise, there is no appeal from a judgment of impeachment. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 8 (1959).

* The remedy for any unreasonable or erroneous action of the House in the exercise of its adjudicatory powers is a political one. The Member-elect who was excluded or expelled may seek re-election, and the voters of his district may return him to office. Such an action by the electorate, of course, will naturally be seriously weighed by the House in taking further action with respect to the same Member. This happened here. After being excluded, Mr. Powell was promptly re-elected from the 18th Congressional District and could have presented himself for admission in April 1967. However, Mr. Powell chose not to present himself. He was again re-elected at the general election last year and then took his seat.

Thus, even if the House had judged erroneously in this case (which it did not), that fact in and of itself provides no basis for judicial review under article III. Just as the courts will strike down any attempt by the legislature to expand the judicial power beyond the bounds of article III, *Marbury* v. *Madison,* 1 Cranch 137, or any attempt by the executive to invade the field of legislation, *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579,* so must the courts recognize the limitations on their own judicial power which result from the commitment by the Constitution of a matter to another branch, *Marbury* v. *Madison,* 1 Cranch at 170. Such a commitment is the historical limitation on the judicial power codified in the provisions of the Constitution giving each house the power to judge the qualifications of its members and to expel a member.

2. *This Is Not a Case or Controversy of a Judiciary Nature.*

The two words describing the scope of federal judicial power, "cases" and "controversies", "have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government." *Flast* v. *Cohen,* 392 U.S. at 94. They indicate that only cases of "a judiciary nature", *i.e.,* cases cognizable in law and equity, can be entertained and resolved. That was made clear at the Constitutional convention:

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* Petitioners make much of the fact that in *Sawyer* the Court struck down illegal action by the executive branch and urge that that decision authorizes this Court to strike down the allegedly illegal action by the legislative branch. But the Constitution does not vest in the executive any power to determine the correctness of its own actions similar to the power given to the legislature to determine the qualifications of its Members, to discipline them for misconduct and to expel them.

"Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.

"The motion of Docr. Johnson [to extend the judicial power to all cases arising under] was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary Nature." 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (rev. ed. 1966) [hereinafter FARRAND].

To determine what cases the Framers believed were "of a judiciary nature", and thus within the scope of article III, it is necessary to examine the historical context in which the framers operated:

"Both by what they said and by what they implied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'" *Coleman* v. *Miller*, 307 U.S. 433, 460 (Frankfurter, J., concurring).

See also Glidden Co. v. *Zdanok*, 370 U.S. 530, 563; *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 123, 150 (Frankfurter, J., concurring); *Atlas Ins. Co.* v. *W. I. Southern*,

Inc., 306 U.S. 563, 568.* Such an examination reveals that where the Framers did intend to depart from the familiar English judicial practice, they wrote into the Constitution explicit provisions to that effect, as for example, by extending the judicial power to cover cases in equity. 2 FARRAND at 428.** On the other hand, the manner in which they drafted article I, section 5 did not represent any departure from what was to them the familiar practice of conferring exclusive adjudicatory power to the legislative branch to judge qualifications of members and to expel or punish them.

Historically, the power to judge the qualifications of and to exclude or expel a member-elect of the legislature was a power of each house of Parliament, not of the courts of common law. Indeed, the courts at Westminster and in this country before 1789 were conspicuously denied power to review judgments of the legislature concerning

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*But even then, the practices of the English judicial system may not be determinative where there are "implicit policies embodied in Article III" which call for an even more restrictive federal judicial power. *See Flast* v. *Cohen*, 392 U.S. at 96-97.

**Especially significant is the Convention's treatment of impeachment. In England, impeachments were brought by the House of Commons to be tried before the House of Lords, not before the courts of common law. 4 BLACKSTONE, COMMENTARIES* 259-61. On this side of the Atlantic, on the other hand, one state vested the power to try such cases in the judiciary (7 THORPE, FEDERAL AND STATE CONSTITUTIONS 3818 (1909)); three others granted the state senate the power (3 *id.* at 1897; 4 *id.* at 2461; 5 *id.* at 2798); and three others created special tribunals composed of legislators and others to try such cases (5 *id.* at 2635, 3087; 6 *id.* at 3253-54). While the United States Senate was ultimately given this power under our Constitution (2 FARRAND 493, 497, 547, 572, 592, 653), under the Virginia and New Jersey plans, the judiciary was to have had this power (1 *id.* at 22, 244, 247), a proposal initially adopted by the Convention as a Committee of the whole (*id.* at 223-24, 231, 232, 237, 238) but later rejected by the Convention (2 *id.* at 39, 46). In addition, the Pinckney and Hamilton plans proposed different forums (1 *id.* at 292-93; 2 *id.* at 136, 159; 3 *id.* at 608, 618-19, 626-27).

the elections, qualifications and conduct of its members. Our Constitution meant to continue that practice.*

(a) *The English Practice.*

The right of the legislature to be the sole and exclusive judge of the elections and qualifications of its members and to exclude or expel them developed as a part of the struggle for legislative independence which this Court reviewed in *United States* v. *Johnson, supra.* In 1604, James I acquiesced in the Commons' position in the case of Sir Francis Goodwin that they, and not the Chancellor, were the proper judges of the election of their members. TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 333 (11th ed. Plucknett 1960) [hereinafter TASWELL-LANGMEAD]. Thereafter,

> "It was fully recognized as their exclusive right by the court of Exchequer Chamber in 1674, by the House of Lords in 1689, and also by the courts of law in 1680 and 1702. Their right was further recognized by the Act 7 § 8 William 3, c. 7, which declared that 'the last determination of the House of Commons of the right of election, is to be pursued'." *Id.* at 318 (footnotes omitted).

In *Barnardiston* v. *Soame,* 6 How. St. Tr. 1063 (1674), Judge Atkins wrote that among the matters in which the courts "must not intermeddle" is the determination by the House of Commons of questions concerning election of their members:

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* The highlights of that historical background are discussed herein. A fuller treatment is set forth in Appendix D, which is separately bound. We wish to note our gratitude to Dorsey D. Ellis, Jr., Associate Professor of Law at the University of Iowa, College of Law, for his investigation of the various original sources discussed therein.

> "But we know that the House of Commons is now possessed of the jurisdiction of determining all questions concerning the election of their own members; so far at least, as is in order to their being admitted or excluded from sitting there." *Id.* at 1083-86.

In this conclusion, the other judges concurred. *Id.* at 1073, 1098.

Blackstone, perhaps the most widely read and most influential of the legal commentators known to the framers, emphasized the lack of jurisdiction in the English courts, stating

> "The lords will not suffer the commons to interfere in settling the election of a peer of Scotland; the commons will not allow the lords to judge of the election of a burgess; nor will either house permit the subordinate courts of law to examine the merits of either case." 1 BLACKSTONE, COMMENTARIES *163.

The significance of that statement is underscored when he subsequently makes clear that the "whole judicial power" of the kingdom is delegated "to the judges of [the] several courts." *Id.* at *267. Thus, the clear implication of Blackstone's statement is that the power to "judge of the elections" of a member, which included the power to judge the qualifications of the elected, was not part of the "judicial power." *

The law of England at the time of the Revolution was thus clear—the House of Commons had exclusive juris-

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* In the debate on the exclusion of John Wilkes, Blackstone stated: "Sir: I think it incumbent upon me to declare, that in my opinion, this House is competent in the case of elections, and that there is no appeal from its competence to the law of the land." 16 PARL. HIST. ENG. 802 (1813).

diction to judge the elections and qualifications of its members. No part of that power resided in or was exercised by the courts of England.

(b) *The Colonial Practice.*

The embryonic legislatures of the American colonies early asserted and began to exercise the exclusive power to judge the qualifications of their members. Like Parliament, their power was exclusive; there are, to our knowledge, no instances where any court in any of the colonies ever exercised judicial review over a legislative adjudication of the qualifications of its members.

The first legislative body to appear in the new world was the House of Burgesses of Virginia, whose practice provides an excellent illustration. It first convened on July 30, 1619, and on that date the qualifications of three Members were immediately challenged; one was seated, two were excluded. *See* JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA: 1619-1659, at 4-5 (1915). In 1692, the House of Burgesses:

> "*Resolved nemine Contradicente* that the house of Burgesses are the Sole & only Judges of the Capacity or incapacity of their owne members, and that any Sherriff or other person whatsoever pretending to be a Judge of ye capacity or incapacity of any member of the House of Burgesses does thereby become guilty of a Breach of the Priviledges of the said House of Burgesses." JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA: 1659-1693, at 379-81 (1914).

What was true in Virginia was true elsewhere—the power to judge qualifications and to exclude or expel was exclusive and never a part of the jurisdiction of the

courts.* Professor Clarke concludes that "[t]he widespread acceptance of the belief that such power [to judge the qualifications of its members] belonged to the legislature was as great in the colonies as in England." CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 198 (1943) [hereinafter CLARKE]. She also concludes that the exercise of that power by the colonial legislatures was not infrequent and that there were at least a hundred persons who were excluded or expelled for one reason or another from the assemblies in the Continental Colonies. *Id.* at 195 n.58.

(c) *The Early State Practice.*

With that colonial background, it is not surprising to find that in most of the constitutions adopted by the states during the revolutionary period, the houses of the state legislatures were expressly given exclusive jurisdiction to judge the elections and qualifications of their members and

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* *See, e.g.*, 3 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW JERSEY 227, 265-66 (1881), where the Assembly replied, in response to the complaint of the King's Governor about the exclusion of a member for refusing to take an oath:

> "We expell'd that member for several contempts; for which we are not accountable to your excellency, nor no body else in this province: We might lawfully expel him; and if we had so thought fit, might have rendered him incapable of ever sitting in this house; and of this many precedents may be produced. We are the freeholders representatives; and how it's possible we should assume a negative voice at the election of ourselves, is what wants little explanation to make it intelligible." *Id.* at 265-66.

See also New York's *Charter of Liberty and Privileges of 1683* which provided:

> "That the said representatives are the sole judges of the qualifications of their own members, and likewise of all undue elections, and may from time to time purge their house as they shall see occasion during the said sessions." 9 ENGLISH HISTORICAL DOCUMENTS 229 (Jensen ed. 1955).

to exclude or expel them.* Again, we have found no indication that the courts of any colony or state, prior to 1789, ever sought to exercise judicial review over legislative determinations rendered pursuant to that power.**

(d) *Summary.*

At the time of the Constitutional Convention it had been settled for over a century that no court had jurisdiction to review a decision of the legislature determining the qualifications of its members. Exclusive jurisdiction over such matters was in the legislatures. An assumption of such power by the judiciary would thus have been unthinkable to the Framers. Clearly, then, disputes over qualifications to sit were not thought to be "cases or controversies of a judiciary nature". Accordingly, such controversies were not intended to be within the scope of judicial power conferred by article III upon the federal courts.

3. *The Subject Matter of This Case Is Not Described in Any Jurisdictional Statute.*

Even if this case against the Members of the House were of a type which the Constitution authorized the federal judiciary to consider, it would not necessarily follow that federal courts would have jurisdiction to decide it. Jurisdiction of the lower federal courts, as well as the appellate jurisdiction of this Court, is dependent upon an affirmative grant by the Congress. *See, e.g.,* U.S. CONST. art. III, §§ 1, 2; *Romero* v. *International Terminal Operating Co.,* 358 U.S. 354; *Lauf* v. *E. G. Shinner & Co.,* 303 U.S.

* The state constitutions in effect as of 1787 are conveniently collected in THORPE, FEDERAL AND STATE CONSTITUTIONS (1909). A summary of the relevant provisions of those constitutions is set forth in Appendix B to this brief.

** As is developed below at pages 72-79, expulsion and exclusion were not always clearly distinguished.

323, 330. It is therefore necessary to examine critically the statutory basis for jurisdiction asserted in the complaint.

Of several alleged statutory bases, the only colorable allegation of jurisdiction is 28 U.S.C. § 1331(a) (1964), which provides for jurisdiction over "all civil actions" in which the "matter in controversy" exceeds $10,000 and which "arises under the Constitution". This provision merely codifies the power given to the courts under article III and thus has no application here for the same reasons that article III has no application here. *See* pp. 35-49 *supra*. However, even if this action were within the seemingly all-embracing language of section 1331(a) which, we submit, it is not, Congress never intended that section to embrace a case of this nature.

Section 1331(a) had its genesis in the Act of March 3, 1875, which encompassed "suits of a civil nature at common law or in equity" in which the "matter in dispute" exceeded $500 and which were "arising under the Constitution". 18 Stat. 470 (1875). As has been noted by this Court, there is a paucity of legislative history of the Act, *Zwickler* v. *Koota*, 389 U.S. 241, 246 n.8. Indeed, one comment has suggested it may have been "sneak" legislation. Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 642-43 (1942). *See also* HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 729-30 (1953); Forrester, *The Nature of a 'Political Question'*, 16 TULANE L. REV. 362, 374-75 (1942).

In the absence of any meaningful legislative debate, we must look, therefore, at the circumstances at the time the statute was passed.

As of 1875, it was unquestioned that legislatures had exclusive power to judge the qualifications of its members, and to exclude or expel them and that a suit like the instant

one was not a "case" or "controversy" in the constitutional sense or a "suit of a civil nature, at common law or in equity".* Moreover, it was precisely in this period of Reconstruction that both the House and Senate were excluding and expelling many members-elect, and only five years had passed since the House's exclusion of B. F. Whittemore of South Carolina for selling appointments to the military and naval academies.** It seems exceedingly unlikely, therefore, that Congress meant to depart from this unbroken tradition and to subject its exclusions and expulsions to judicial scrutiny when it enacted the above Act in 1875. This conclusion is underscored by the requirements of a jurisdictional amount. In a matter of this fundamental constitutional concern, it hardly seems likely that Congress should have intended the jurisdiction of the federal courts to turn on the happenstance of the requisite minimum jurisdictional amount.

Furthermore, only five years before the passage of the above Act, Congress had created a more specific grant of jurisdiction that excluded cases like the present one. That was section 23 of the "Force Act" of May 31, 1870, ch. 114, 16 Stat. 146.† That statute granted jurisdiction over cases in which a person alleged that he had been "defeated" or "deprived of his election" to any office or had his right "to hold and enjoy such office, and the emoluments thereof" impaired as a result of a denial of fifteenth amendment rights.

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* This language was changed to "civil action" in the 1952 Code. *Compare* 28 U.S.C. §41(1) (1946) *with* 28 U.S.C. §1331 (1952). The Reviser's Note to the latter states, "Words 'all civil actions' were substituted for 'all suits of a civil nature, at common law or in equity' to conform with Rule 2 of the Federal Rules of Civil Procedure." *Id.* at 4186.

** See Appendix C for a summary of the congressional precedents regarding exclusion or expulsion.

† Now 28 U.S.C. §1344 (1964).

Moreover, and very explicitly, it excepts even from that limited jurisdiction cases involving the offices of "elector of President or Vice President, United States Senator, Representative in or delegate to Congress, or members of a state legislature." The purpose of the specific exceptions was described on the floor of the House as follows:

> "It was thought important by the conference committee that the courts of the United States under no possible condition of things should be authorized to intervene to settle any case of contest whatever about the election of members of Congress, about the election of electors for President or Vice President of the United States, or about the election of the members of a State Legislature, leaving the last under the constitutions of the several States to be settled exclusively by the bodies to which they were elected." CONG. GLOBE, 41st Cong., 2d Sess. 3872 (1870).

This interpretation of section 1344 was followed by the Fifth Circuit in *Johnson* v. *Stevenson, supra.* There the court unanimously held that section 1344 deprived it of jurisdiction over a suit to enjoin the Democratic Party from certifying Lyndon B. Johnson as the nominee of that party for United States Senator from the State of Texas. A like conclusion follows a fortiori in this action which seeks to enjoin the House of Representatives and to require it to seat a Member-elect.*

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* Petitioners also argue that a three-judge court should have been convened. However, since the resolution challenged here was not an Act of Congress as required by 28 U.S.C. §2282 (1964), a three-judge court would not have been proper. *Stamler* v. *Willis,* 89 S. Ct. 677, *vacating and remanding so appeal could be taken to court of appeals,* 287 F. Supp. 734 (N.D. Ill. 1968); *Krebs* v. *Ashbrook,* 275 F. Supp. 111, 118 (D.D.C. 1967), *aff'd per curiam,* No. 21382 (D.C. Cir. May 14, 1968), *cert. denied,* 89 S. Ct. 619.

Thus, we submit, the subject matter of this suit does not come within the judicial power delegated to the courts in article III, is not a case or controversy arising in law and equity as described in article III, section 2 and is not described by any jurisdictional statute. If we are correct on any one of these three points, the decision below must be affirmed since there is a lack of subject matter jurisdiction. *Baker* v. *Carr, supra.*

C. *In Addition, the Issues in This Case Are Political Questions Which Are Not Justiciable.*

Petitioners seek to have this Court review the decision of the House to exclude Mr. Powell for reasons of personal misconduct and malfeasance in office. However, the ultimate question thus presented—whether the House's action was proper—is in its nature "political" and "can *never* be made in this court". *See Marbury* v. *Madison*, 1 Cranch at 170 (emphasis added). This Court's duty with respect to such a question

> ". . . is to take for a guide the decision made on them by the proper political powers, and, whether right or wrong . . . enforce it till duly altered. . . ." *Luther* v. *Borden*, 7 How. 1, 56 (dissenting opinion). *See also id.* at 47 (opinion of the Court).

The most considered analysis of the political question doctrine is contained in *Baker* v. *Carr, supra.* There, this Court concluded that "it is the relationship between the judiciary and the coordinate branches of the Federal Government . . . which gives rise to the 'political question'," and that "nonjusticiability of a political question is primarily a function of the separation of powers." 369 U.S. at 210.

The Court then delineated the standards which identify a political question:

> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; *or* a lack of judicially discoverable and manageable standards for resolving it; *or* the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; *or* the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; *or* an unusual need for unquestioning adherence to a political decision already made; *or* the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* at 217 (emphasis added).

As that formulation makes clear, the several standards are framed in the alternative, and, if any one is "inextricable from the case at bar", *ibid.*, a political question is present.

Several of the criteria enunciated in *Baker* v. *Carr, supra,* are inextricable from the issues of this case.

1. *There Is a Textually Demonstrable Exclusive Commitment of the Adjudicatory Power Over This Case to the House of Representatives.*

The first test laid down by this Court, and the most significant for present purposes, is whether there is "a textually demonstrable constitutional commitment of the issues to a coordinate political department." *Ibid.*

The Constitution makes clear that the subject matter of this case in whatever form it takes—action for declaratory judgment or for injunction and mandamus or for back salary—is for decision by the House of Representatives alone. Article I, section 5, provides:

> "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . .
>
> "Each House may . . . punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."

As Judge Burger said,

> " . . . The language that 'Each House shall be the judge' can hardly mean less than that the Members, for this purpose, become 'judges,' withdrawing judging of qualifications from the judicial branch." (A. 70)

It is no answer to this unexceptionable proposition simply to assert, as petitioners have done (Br. 160), that the courts might, were the power theirs, interpret the word "qualifications" differently from the House.* In judging the qualifications of a Member or in excluding or expelling a Member, the House sits "as a judicial tribunal", *Barry* v. *United States ex rel. Cunningham,* 279 U.S. at 616, which necessarily implies the power and duty to interpret the law, including the Constitution. To say that the House might have interpreted the law incorrectly in the eyes of this or any other Court is not the equivalent of saying that it has exceeded the power committed to it or that this Court can review such a determination. Cases such as *Barry* v. *United States ex rel. Cunningham, supra,* and the others discussed above (pp.

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* Petitioners' argument that this Court is the "ultimate interpreter of the Constitution" (Br. 26), is simply not correct with respect to those adjudicatory powers entrusted by the Constitution to either house. It is the House, not this Court, which must interpret the meaning of the terms "Qualifications" and "disorderly Behaviour" under article I, section 5, or of the term "Inhabitant" under article I, section 2.

37-38 *supra*) as well as the history of the clause, pp. 45-49 *infra*, make it clear that the subject matter involved in this case is expressly and "demonstrably" committed by the Constitution to the House for final resolution.*

Accordingly, the particular political question involved here is one which goes to the subject-matter jurisdiction of the federal courts. While *Baker* v. *Carr*, *supra*, distinguished lack of subject matter jurisdiction from non-justiciability, that distinction was made only in the context of that particular case and was surely not meant to impair the continuing validity of a long series of prior cases holding that the existence of certain political questions precluded federal subject-matter jurisdiction. 369 U.S. at 210.

This was made clear by the recent case of *Flast* v. *Cohen*, 392 U.S. 83. There, this Court pointed out that justiciability is "a concept of uncertain meaning and scope", and a "blend of constitutional requirements and policy considerations." *Id.* at 95, 97. This Court also said there are two "complementary constitutional considerations" which are promoted by the concept of justiciability:

> ". . . . Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Id.* at 97.

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* While scholars and textwriters have disagreed on the criteria which delineate a political question in other contexts, all we have found agree that the power to judge the qualifications of members of the House is a political question for exclusive resolution by the House. CHAFEE 253; Dodd, *Judicially Non-Enforceable Provisions of the Constitution*, 80 U. PA. L. REV. 54, 56 (1931); Sharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L. J. 517, 540 (1966); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6-10 (1959); Note, *The Political Question Doctrine and Adam Clayton Powell*, 31 ALBANY L. REV. 320 (1967).

As our discussion of the relationship between article I and article III powers demonstrates, as indeed the text of the Constitution itself makes abundantly clear, any action by this Court other than "mere acknowledgment of exclusive Congressional power", *Coleman* v. *Miller,* 307 U.S. 433, 459 (Black, J., dissenting), is in no wise consistent with a system of separated powers", *Flast* v. *Cohen,* 392 U.S. at 97.*

This case, therefore, is analogous to past decisions of this Court holding that the particular political questions there involved were not appropriate subject matters of federal jurisdiction. Like the instant case, those involved the consideration of functions committed by the Constitution to a coordinate branch of the federal government.

Prominent among those authorities are cases involving alleged violations of and based on the Guaranty Clause, which hold that federal courts have no subject-matter jurisdiction whatever to determine whether state action has deprived the citizens of a state of a "Republican Form of Government" since that question has been constitutionally committed to Congress. *Pacific States Tel. & Tel. Co.* v. *Oregon,* 223 U.S. 118, 151; *Kiernan* v. *City of Portland,* 223 U.S. 151, 164, 166; *Taylor & Marshall* v. *Beckham (No. 1),* 178 U.S. 548, 578; *Georgia* v. *Stanton,* 6 Wall. 50. In all four cases, this Court held that there was no subject-matter jurisdiction.**

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* Unlike the issues in the instant case, the standing question in *Flast* v. *Cohen* did not raise separation of powers problems related to improper judicial interference in areas committed to other branches of the federal government. 392 U.S. at 100.

** Article IV, section 4 provides:

> "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."

It is noteworthy that nowhere in article IV, section 4 does the term "Congress" or "houses of Congress" appear expressly. Never-

So too, political questions involving the enactment of constitutional amendments have generally been regarded as expressly entrusted to Congress by article V of the Constitution. *Cf. Dillon* v. *Gloss*, 256 U.S. 368. When a majority of five suggested in dicta that the courts might possess some power to review congressional judgments on those matters, *Coleman* v. *Miller, supra,* they were sharply rebuked in a dissent by Mr. Justice Black joined by three other Justices (Douglas, Frankfurter, and Roberts) in clear and uncompromising language:

> "Since Congress has sole and complete control over the amending process, subject to no judicial review, the views of any court upon this process cannot be binding upon Congress, and insofar as *Dillon* v. *Gloss* attempts judicially to impose a limitation upon the right of Congress to determine final adoption of an amendment, it should be disapproved. . . .
>
> "Congress, possessing exclusive power over the amending process, cannot be bound by and is under no duty to accept the pronouncements upon that exclusive power by this Court or by the Kansas courts. Neither state nor federal courts can review that power. Therefore, any judicial expression amounting to more than mere acknowledgment of exclusive Congressional power over the political process of amendment is a mere admonition to the Congress in the nature of an

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theless, this Court has uniformly held that the "guarantee" accorded by the Clause has been entrusted to Congress and may not be enforced by the courts. *See Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 612; *Ohio ex rel. Bryant* v. *Akron Park District*, 281 U.S. 74, 79-80. Having reached that conclusion with respect to a constitutional provision that nowhere mentions the Congress, this Court, it seems to us, must reach a similar conclusion with respect to a constitutional provision (article I, section 5) that expressly and specifically commits the matter in issue here to "Each House".

advisory opinion, given wholly without constitutional authority." 307 U.S. at 459-60.

Relying on those cases, therefore, we conclude that federal courts do not have subject-matter jurisdiction to decide a political question, such as the qualifications of a Member, which has been expressly and exclusively committed to the House. That conclusion is especially compelling when, as is the case here, Members of the House themselves are parties and the Court is asked to enter relief directly against them as representing the House itself. *Cf. Georgia* v. *Stanton, supra; Mississippi* v. *Johnson, supra.*

2. *The Courts Cannot Mold Effective Relief for Resolving This Case. Even If They Could, To Do So Would Create a Potentially Embarrassing Confrontation Between Coordinate Branches.*

Moreover, additional criteria of a political question are present here, as are the policy considerations which result in nonjusticiability.

As this Court noted in *Flast* v. *Cohen, supra,* one of the policy considerations which is not always clearly distinguished from constitutional considerations is the restriction of federal courts to cases traditionally thought of as being capable of resolution through the judicial process. 392 U.S. at 97. And in *Baker* v. *Carr, supra,* this Court wrote, "In the instance of nonjusticiability . . . the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and *whether protection for the right asserted can be judicially molded.*" 369 U.S. at 198 (emphasis added).

The first and most formidable barrier to the granting of any relief is the Speech or Debate Clause, which, as we

have previously demonstrated, precludes this Court from interfering in the legislative process by questioning the Members (and their agents) for their vote on Mr. Powell. Secondly, there is the privilege from arrest given to each Member in article I, section 6, which renders any attempt to enforce an order against the House ineffectual and unconstitutional. The Framers could not have intended judicial review of decisions of the House pursuant to article I, section 5, because such review would have inevitably sparked a confrontation between the branches of government which the Speech or Debate and Privilege from Arrest Clauses were designed to prevent.

Considerations such as these compel the conclusion that neither injunction, mandamus nor declaratory relief is available against the Members and agents of the House respecting official action within the House. This case accordingly presents a nonjusticiable political question, as the court below held.*

(a) *Injunction.*

In *Mississippi* v. *Johnson, supra,* for example, this Court held that its equity power was limited by the separation of powers:

> "Neither [the legislative nor the executive branch] can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance." 4 Wall. at 500.

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* *See* A. 66-78 (Burger, J.), A. 92-93 n.3 (McGowan, J.). Judge Leventhal did not travel the political question route to arrive at the unanimous conclusion of nonjusticiability, but he reached the same result on more conventional grounds (A. 95-101). As he noted, the relief requested is discretionary, and the denial of the relief was not an abuse of discretion for the reasons stated in Point III, *infra.*

More recently, the same rule was reiterated in *Trimble* v. *Johnston*, 173 F. Supp. 651, 653 (D.D.C. 1959):

> "[T]he judicial branch of the Government may not control or direct the legislative or executive departments. Thus, the Federal courts may not issue an injunction or a writ of mandamus against the Congress."

No previous action has sought to enjoin the entire Congress or either house thereof. There have, however, been cases which attempted to enjoin congressional committees. In those cases the courts have uniformly determined that such an action will not lie. It follows, a fortiori, that this suit, which is against the entire House, is barred.

In *Hearst* v. *Black*, 87 F.2d 68 (D.C. Cir. 1936), suit was brought to enjoin a Senate subcommittee from copying and using telegraph messages in alleged violation of various constitutional and statutory provisions. The Court of Appeals held that the suit could not be entertained, stating,

> "[T]he universal rule, so far as we know it, is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference." *Id.* at 71.

Accord, Pauling v. *Eastland*, 288 F.2d 126 (D.C. Cir. 1960); *cert. denied*, 364 U.S. 900; *Mins* v. *McCarthy*, 209 F.2d 307 (D.C. Cir. 1953) (court will not enjoin congressional hearing); *Stamler* v. *Willis*, 287 F. Supp. 734 (N.D. Ill. 1968), *vacated and remanded on other grounds*, 89 S. Ct. 677; *Randolph* v. *Willis*, 220 F. Supp. 355 (S.D. Cal. 1963) (court will not enjoin hearing of House Committee on Un-American Activities); *Methodist Federation* v. *Eastland*, 141 F. Supp. 729 (D.D.C. 1956) (court will not enjoin Senate subcommittee from publication of report); *Fischler* v.

McCarthy, 117 F. Supp. 643, 647-50 (S.D.N.Y.) (court will not enjoin Senator from compelling production of documents), *aff'd on other grounds*, 218 F.2d 164 (2d Cir. 1954).*

The agents of the House named in the complaint are also immune from an injunction in this case for much the same reasons that are applicable to the Members themselves. As we have shown, the Speech or Debate Clause protects the non-member agents from suit. Directly in point is *Methodist Federation* v. *Eastland, supra.* There a three-judge court, in a suit to enjoin publication of a document ordered published by a concurrent resolution of both Houses, dismissed for failure to state a claim as to the Public Printer and the Superintendent of Documents. The court there held: "We have no more authority to prevent Congress, or a committee or public officer acting at the express direction of Congress, from publishing a document than to prevent them from publishing the Congressional Record." 141 F. Supp. at 731-32. *See also Bradlaugh* v. *Gossett*, 12 Q.B.D. at 27.**

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* A further reason why injunctive relief cannot be granted is the long-recognized rule that there is no "federal equity power" to determine title to a public office. *See Baker* v. *Carr*, 369 U.S. at 231. Thus, this Court has held that a federal court lacks power to enjoin a state proceeding to remove a public officer, *Walton* v. *House of Representatives*, 265 U.S. 487; *In re Sawyer*, 124 U.S. 200, and to enjoin the removal of a federal officer, *Keim* v. *United States*, 177 U.S. 290; *White* v. *Berry*, 171 U.S. 366, 376-77; *Ex parte Hennen*, 38 U.S. 230.

** The analogous doctrine of sovereign immunity, barring suits to compel a government official to take official action (except in the limited class of cases where mandamus lies) is also applicable. *See, e.g., United States ex rel. Brookfield Constr. Co.* v. *Stewart*, 234 F. Supp. 94 (D.D.C.), *aff'd*, 339 F.2d 753 (D.C. Cir. 1964); *Randolph* v. *Willis, supra.*

(b) *Mandamus.*

Mandamus under 28 U.S.C. § 1361 (1964) is also unavailable to petitioners in view of the barriers described above. *See Trimble* v. *Johnston,* 173 F. Supp. 651, 653 (D.D.C. 1959) ("the judicial branch . . . may not control or direct the legislative . . . department. . . . Thus, the Federal courts (may not issue . . . a writ of mandamus against the Congress").

Indeed, neither the Members nor the agents of the House are officers or employees of the United States within the meaning of section 1361. The Act does not define the words "officer or employee of the United States or any agency thereof," nor is there any general definition of those terms applicable to title 28 or to the code as a whole. The legislative history makes clear, however, that the statute was not aimed at legislative officials. Both committee reports stated that the primary purpose of the bill was to facilitate "review by the Federal courts of administrative actions". There is no suggestion in the reports of an intent to cover Members of Congress or officers or employees of Congress. S. Rep. No. 1992, 87th Cong., 2d Sess. (1962); H.R. Rep. No. 536, 87th Cong., 1st Sess. (1961); *cf.* U.S. Const. art. I, 6, amend. XIV, 3.

Consideration of the bill in the Senate and the House themselves was perfunctory. The manager of the bill in the House stated, however, that it was instigated by the "growth in the size and power of the executive branch of the Government". 107 Cong. Rec. 12157 (1961). Surely if Congress had intended to subject its members and agents to questioning by the courts, some extensive reference would have been made to the point in the committee reports or in debate.*

* Futher indication of the congressional understanding that legislative officials and personnel were not covered by the statute is

Moreover, mandamus will lie only to compel performance of a ministerial duty and never to impinge upon official discretion. Certainly mandamus does not lie to compel a Member of Congress to vote or refrain from voting, or to take or refrain from taking any other action within the House in the course of his official duties. *Compare Marbury* v. *Madison*, 1 Cranch at 166, 170-71, *with Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318.

Furthermore, since Members of the House cannot be subjected to mandamus, the same result cannot be achieved indirectly by mandamus against the officers of the House. For example, to require the Speaker to administer the oath despite the opposition of over two-thirds of the Members would be simply another way of ordering the House to cause the oath to be administered. Administering the oath under such circumstances can hardly be considered a ministerial act.

The issuance of a writ of mandamus to compel the Sergeant-at-Arms to pay Mr. Powell's back salary cannot issue for additional reasons. The Sergeant-at-Arms is an elected officer of the House, 2 U.S.C. §83 (1964), nominated by the caucus of the majority party for each new Congress, and by law, he is obligated to "keep the accounts for the pay and mileage of Members . . . and pay them as provided by law", 2 U.S.C. § 78 (1964). An individual has a

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derived from the precedents interpreting the constitutional phrase "officer of the United States". *See, e.g.*, 17 OP. ATT'Y GEN. 419, 420 (1882) ("it seems that a member of Congress is not an officer of the United States in the constitutional meaning of the term"); *Dropps* v. *United States*, 34 F.2d 15, 17 (8th Cir. 1929), *cert. denied*, 281 U.S. 720 (in the constitutional sense, an "officer of the United States . . . is one who is appointed by the president or by a court of law or by the head of a department"); *Hare* v. *Hurwitz*, 248 F.2d 458, 461 (2d Cir. 1957) ("The phrase 'officer of the United States' . . . is understood as referring only to those government officials appointed by the President, by members of his Cabinet, or by the courts . . ."). *See also United States* v. *Mouat*, 124 U.S. 303; *United States* v. *Germaine*, 99 U.S. 508; *Kennedy* v. *United States*, 146 F.2d 26 (5th Cir. 1944).

right to a Member's salary without taking the requisite oath only if there is an interval of time between the commencement of his term and the beginning of the first session, 2 U.S.C. § 34 (1964). Otherwise, he is entitled to the salary only "after he has taken and subscribed the required oath", 2 U.S.C. § 35 (1964).*

It is clear, therefore, that Mr. Powell has no statutory right to obtain back salary from the Sergeant-at-Arms. He has no right under 2 U.S.C. § 34 (1964), for that provision only permits Representatives-elect to be paid a salary for the period "from the beginning of their term until the beginning of the first session of each Congress".** Nor does he have a right under 2 U.S.C. § 35 (1964), since he never took the requisite oath in the 90th Congress. There is, therefore, no statutory basis for mandamus directing the Sergeant-at-Arms to pay over any alleged back salary to Mr. Powell, even if the action of the House in excluding Mr. Powell were deemed wrongful.†

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* Article VI, clause 3 of the Constitution requires that "Representatives . . . shall be bound by Oath of Affirmation, to support this Constitution . . . ." *See also* 2 U.S.C. §25 (1964). In addition, section 6 of article I provides that "Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States."

** That right of a Representative-elect will not usually arise in light of the fact that the term of Representatives and the beginning of the first session of the Congress will normally fall on the same day. U.S. CONST. amend. XX. Although Mr. Powell's term commenced on January 3, 1967, U.S. CONST. amend. XX, and the first session of the 90th Congress did not meet until January 10, 1967, 113 CONG. REC. H1 (daily ed. Jan. 10, 1967), by the terms of House Resolution 1 of that Congress, he was paid a salary until March 1, 1967. *Id.* at H14; 118 CONG. REC. H1956-57 (daily ed. Mar. 1, 1967).

† In actual fact, the Sergeant does not have sufficient funds to pay Mr. Powell's $55,000 salary claim (*cf.* 2 U.S.C. §31 (1964)). Separate accounts for Representatives' salaries are created by the Treasury for each fiscal year. *See, e.g.*, Legislative Branch Appropriation Act, 1967, P.L. 89-545, 83 Stat. 354 (1966); Legislative Branch Appropriation Act, 1968, P.L. 9357, 81 Stat. 127 (1967); Legislative Branch Appropriation Act, 1969, P.L. 90-417, 82 Stat.

Moreover, any order directing the Sergeant-at-Arms to pay any money to Mr. Powell would engender a direct confrontation between coordinate branches of the Government; this time between the Court and the House of the 91st Congress. Since the Sergeant has no statutory authority to pay Mr. Powell his back salary, the only way he could be authorized to make such payment would be by special resolution of the present House, similar to House Resolution 1 of the 90th Congress, authorizing the payment of salary from the House contingency fund. *See* Legislative Branch Appropriation Act, 1969, P.L. 90-417, 82 Stat. 398 (1968); *cf.* 31 U.S.C. § 671 (1964). This Court cannot direct the House to pass such a resolution.

There is, therefore, no way this Court can order the Sergeant to pay Mr. Powell. To collect such a claim, Mr. Powell would need an order from this Court either compelling the Sergeant to ignore 2 U.S.C. § 35 (1964), or compelling the House of the 91st Congress to pass a special resolution authorizing the Sergeant-at-Arms to pay him from the contingency fund. Such an order would, of course, be wholly beyond this Court's power to grant, wholly apart from the fact that the present House is not even a party to the action.

Finally, with respect to the general prayer to have Mr. Powell accorded "rights, privileges and emoluments" to which a duly elected and qualified Representative is entitled,

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398 (1968). And it is the custom of the Sergeant to turn back to the Treasury all unexpended funds after the close of each fiscal year. *See* 2 U.S.C. §80 (1964); 31 U.S.C. §671 (1964). *See generally Romney* v. *United States*, 167 F.2d 521 (D.C. Cir. 1948), *cert. denied*, 334 U.S. 847; *Crain* v. *United States*, 25 Ct. Cl. 204 (1890). Thus, the Sergeant has returned to the Treasury the bulk of the funds allocated as compensation for the Representative of the 18th Congressional District of New York in the 90th Congress. The only such funds still held are those covering salary for the present fiscal year commencing July 1, 1968.

a directive so expressed is too vague to be an appropriate subject either for relief by injunction or mandamus.*

(c) *Declaratory Judgment.*

Nor can petitioners obtain declaratory relief in lieu of an injunction or mandamus. *See* 28 U.S.C. §§ 2201-02 (1964). As *Pauling* v. *Eastland, supra,* makes clear, declaratory relief will not lie where a court could not ultimately give injunctive or other coercive relief. *Accord, Randolph* v. *Willis,* 220 F. Supp. at 360; *Fischler* v. *McCarthy,* 117 F. Supp. at 649-50. *See also Perkins* v. *Lukens Steel Co.,* 310 U.S. 113, 127-28; *Pauling* v. *McNamara,* 331 F.2d 796 (D.C. Cir. 1963), *cert. denied,* 377 U.S. 933; *Goldstein* v. *Johnson, supra; United States ex rel. Jordan* v. *Ickes, supra; Doehler Metal Furniture Co.* v. *Warren, supra.*

Petitioners thus cannot overcome the defects of their prayer for injunctive or mandatory relief by limiting their prayer to one for declaratory relief, Petitioners' Memorandum 16, especially in light of the fact that this action

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* The state cases cited by petitioners in which mandamus was issued against state legislative officials are not even remotely on point. *See, e.g., State ex rel. Donnell* v. *Osburn,* 147 S.W.2d 1065 (Mo. 1941); *State ex rel. Benton* v. *Elder,* 31 Neb. 169, 47 N.W. 710 (1891). First, none of them involved 28 U.S.C. §1361, a federal statutory provision which by its terms does not apply to members or agents of the House. Second, those cases, in the main, involved acts of a purely ministerial nature (compelling the Speaker to open and publish election returns) and not the wholly discretionary act of judging the election and qualifications of a candidate to a contested office. The distinction between those two acts—opening and publishing election returns, a ministerial act, and judging the elections and qualifications of political candidates, a discretionary act—was clarified in the subsequent Nebraska decision, *State* v. *Van Camp,* 54 N.W. 113, 118 (Neb. 1893), where the court made clear that *State ex rel. Benton* v. *Elder, supra,* did not apply to the discretionary act of judging elections and qualifications. *See also French* v. *Senate of California,* 146 Cal. App. 604, 80 P. 1031 (1905).

does not now have "sufficient immediacy and reality" to warrant a declaratory judgment. *See Golden* v. *Zwickler*, 37 U.S.L.W. 4185 (U.S. Mar. 4, 1969); pp. 112-13 *infra*.

In summary, it is beyond the power of this or any other court to mold any of the relief which petitioners sought. And even if a remedy could be molded, it could not be done, as Judge Burger observed, contrary to the action of the House "without expressing lack of respect due coordinate branches of government" or without creating "a potentiality of embarrassment from multifarious pronouncements by various departments on one question" (A. 71-72). This unavailability of a remedy and the constitutional considerations previously discussed intertwine with and reinforce each other, and lead inexorably to the conclusion that the issues raised by petitioners in this action are all nonjusticiable political questions.

POINT II

The Action Taken by the House of the 90th Congress Was a Proper Exercise of the Powers Delegated to It by the Constitution.

As we have demonstrated, the action of the House of the 90th Congress in excluding Mr. Powell is not reviewable by this Court or by any other court for a variety of constitutional reasons designed to protect the independence and integrity of the legislative branch of the government. Accordingly, it is not necessary for the House to justify its actions in the courts.

However, the importance of the subject matter impels us to demonstrate, as we do below, that even if the House's action were reviewable, the complaint was properly dismissed, as respondents alternatively moved, for failure to state a claim. The House's action was a proper exercise of

its constitutional power to judge the qualifications of its Members or, alternatively, to expel a Member upon the vote of two-thirds, and it did not infringe upon any constitutional provisions. Thus, the Court of Appeals' affirmance of the District Court's dismissal of the complaint must be affirmed.

Both of these constitutional powers—the power to judge qualifications and the power to expel—have sound underpinnings in policy and in history.

Ours, of course, is a republican form of government. The citizens do elect their representatives to the Congress, but this does not automatically lead to the conclusion that the nation as a whole has to accept the choice of a single electoral district. The citizens of the entire nation, speaking through their representatives in Congress, have an interest in not having persons demonstrably unfit passing upon legislation which will affect the entire citizenry. In short, each house of the Congress has a duty "to assure the integrity of its legislative performance and its institutional acceptability to the people at large as a serious and responsible instrument of government" (A. 94, McGowan, J., concurring) by removing the "obvious cases of unfitness". CHAFEE 257. These obvious cases of unfitness would include instances in which voters from a single district sent to the national legislature a man who was insane, *cf. John M. Niles,* SENATE CASES 10, or who had been convicted of treason or sedition. They would also include a man who abused the privileges of office by misappropriating public funds or who contumaciously flouted the valid orders of a court of law. Once the power of the House to deal with such cases of unfitness is recognized, as surely it must, it would be entirely inappropriate for this Court to substitute its judgment for the judgment of the House

in determining what is sufficient "unfitness" to justify exclusion or expulsion.

This is a case where the House found obvious unfitness. Mr. Powell was found by the Select Committee and by the House itself to have unlawfully and wilfully misappropriated public funds and to have contumaciously ignored the processes and authority of the courts of the State of New York. Those findings are unchallenged in this litigation.*

As we shall show below, the Framers did not intend to ban the prevailing British and Colonial practice of the times, which permitted legislative bodies to exclude elected candidates on grounds of individual misconduct (treason, corruption and the like) in violation of conventional standards of personal behavior.**

A. *The Exclusion of Mr. Powell Was a Proper Exercise of the House's Power To Judge the Qualifications of Its Members.*

As noted before, article I, section 5 of the Constitution grants each house of the Congress the power to judge the

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* It is true that the grand jury which was considering criminal charges against Mr. Powell was dismissed without returning any indictment against him. *See* 115 CONG. REC. H5 (daily ed. Jan. 3, 1969). The failure of the United States to prosecute Mr. Powell is as irrelevant to the action of the House, as would be the failure to prosecute or a prosecution itself to a judgment of impeachment based on the same misconduct. *See* U.S. CONST. art. I, § 3, cl. 7. Criminal prosecutions serve different functions, are governed by different procedures, and are carried on in different forums than the exercise of the power granted in the Constitution to judge qualifications, to exclude, to expel, or to impeach.

** This Court need not in this case consider the question whether the House or Senate could constitutionally exclude members-elect on grounds such as an individual's race, his religious beliefs, or the exercise of his right of free speech. But even if the House or Senate should ever exclude someone for any such reason (which has never occurred), an article III court would not necessarily be empowered to enjoin an equal branch of the Government from taking such action, even though the court found it to be unconstitutional.

qualifications of its members, while section 2 of article I sets forth in negative form qualifications as to age, citizenship and inhabitancy.

Mr. Powell, of course, was found to have possessed the necessary age, citizenship and inhabitancy. Nonetheless, he was excluded, and that exclusion is consistent with the intent of the Framers of the Constitution with respect to provisions for judging qualifications. Although the Framers intended to prohibit Congress from passing laws adding new "standing incapacities" applicable to all who might seek office, *e.g.*, a property requirement, the Constitution clearly grants to each house of the Congress the right to adjudge an individual member as unqualified in a particular case for reasons of personal misconduct.

This conclusion follows from the historical background against which the Framers acted and wrote, the proceedings of the Constitutional Convention, the ratification of the Constitution and subsequent history.* Petitioners' contention to the contrary rests upon Professor Charles Warren's *The Making of the Constitution* (1928) [hereinafter WARREN]. They recoil at the suggestion that Professor Warren might have erred as to one of the many conclusions reached in his monumental historical study. But since the time he wrote, much work has been done by historians in exploring the operations of the colonial legislative bodies,** and we believe he would have been the first to

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* We have set forth our findings in detail in Appendix D, which is separately bound. We discuss here only the highlights of that historical background.

** Particularly pertinent here are CLARKE 132-204, and GREENE, THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES, 198-99 (1963) [hereinafter GREENE].

urge that his historical interpretation should be continually reappraised in the light of subsequent research.*

1. *The Intention of the Framers*

Before discussing the proceedings at the Constitutional Convention and the ratification campaign, it is first necessary to look at the background against which the Framers acted and wrote—the practices of the House of Commons and of the colonial and early state legislatures.

(a) *The English Practice.*

Petitioners' discussion of and emphasis upon the *Wilkes Case* leaves the impression that the powers to exclude or expel exercised by the House of Commons in that instance was without precedent in law or custom. But The Journal of the House of Commons (1803) [hereinafter C.J.] makes clear that the power had long existed and had been exercised in a number of cases, extending back to as early as 1553, when the Commons excluded a member because, as a clergyman, he had a voice in the established church's legislative body. 1 C.J. 27.

One of the most famous exercises of the power occurred in 1712, when Robert Walpole, who had been expelled for receiving kickbacks on defense contracts, was re-elected while still incarcerated in the Tower of London. The House resolved that he was "incapable of being elected a Member to serve in this present Parliament". 17 C.J. 128. Owing to the prominence of the member involved, the *Walpole Case* was a *cause celebre* in its day, and appears to have been well known in America at the time the Constitution was drafted. *See* PROCEEDINGS RELATIVE TO . . . THE [PENNSYL-

* *Cf.* Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

VANIA] CONSTITUTIONS OF 1776 AND 1790, at 89 (1825) [hereinafter PENN. CONST. PROC.].

Like Walpole, Wilkes was initially expelled* from the House of Commons, in 1769, following his conviction in the Court of Kings Bench on a charge of seditious libel. *Proceedings in the Case of John Wilkes,* 19 How. St. Tr. 1075, 1124 (K.B. 1768); 16 PARL. HIST. ENG. 533-35, 545 (1813). Thereafter, Wilkes was re-elected and the House of Commons resolved that he was "incapable of being elected a member to serve in this present Parliament". *Id.* at 580. Twice again he was re-elected and each time excluded. *Id.* at 580-81, 583-90.

Wilkes was subsequently elected to the next Parliament and was as a matter of course allowed to sit. He and his supporters pressed throughout the period of the American Revolution for a declaration by the later House of Commons that the action on the part of the earlier House was improper. They did not prevail until 1782 in the aftermath of the major political upheaval following the ignominious defeat at Yorktown. 1 COSTIN & WATSON, THE LAW AND WORKING OF THE CONSTITUTION: DOCUMENTS 1660-1914, at 235 (1952).**

Although the motion expunging from the record the resolutions pertaining to Wilkes' expulsion and exclusions characterized them "as being subversive of the Rights of the whole Body of Electors of this Kingdom", *ibid.*, even

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* Although the resolution "expelled" Wilkes, he had not been seated and sworn when it was passed. 16 PARL. HIST. ENG. 533-35, 545 (1813). *Cf.* Judge McGowan's opinion in the Court of Appeals (A. 92-94). As noted in Appendix D, the powers to exclude and to expel were often used interchangeably.

** Significantly, although Wilkes and his supporters pressed for some thirteen years to have the resolutions concerning him declared improper by the Commons, they never sought to invoke judicial interference in such internal parliamentary matt

this corrective was on Parliament's own initiative,* and that legislative body thereafter continued to exercise the power to judge the qualifications of its members with respect to matters of individual character and conduct. *See* TASWELL-LANGMEAD 585-86; *Bradlaugh* v. *Gossett, supra;* ARNSTEIN, THE BRADLAUGH CASE 53-62, 73, 96, 114-115, 129 (1965).

Shortly before the American Revolution, the state of the law with respect to the power of the House of Commons to judge the qualifications of its members was conveniently summarized by Blackstone, an authority heavily relied upon by 18th-century American lawyers. He first listed, in negative form, the "standing incapacities" for membership in either house imposed by statute and law and custom of Parliament, which were general standards of prospective and universal application. He then added a statement reflecting Parliament's decision in the *Wilkes Case* and his own extensive investigation of the many precedents supporting that decision:

> "And there are not only these standing incapacities; but if any person is made a peer by the king, or elected to serve in the house of commons by the people, yet may the respective houses upon complaint of any crime in such person, and proof thereof, adjudge him disabled and incapable to sit as a member: and this by the law and custom of parliament." 1 BLACKSTONE, COMMENTARIES *163 (4th ed. 1770 and subsequent editions) (footnotes omitted).

He then turned to the qualifications for membership in the House of Commons. Again, he first listed, also in negative

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* As we note in Appendix D, at 24 n.*, we have been unable to find that this resolution, which was passed during the American Revolution, came to the attention of 18th century Americans at any time before the Constitution was ratified.

form, those which were "standing restrictions and disqualifications", *id* at *176 which included age, citizenship, office, inhabitancy, property ownership and attainder of treason or felony. *Id.* at *175. And again he noted that for reasons beyond those "standing restrictions and disqualifications" a person could be disqualified:

> "But, subject to these standing restrictions and disqualifications, every subject of the realm is eligible of common right: though there are instances, wherein persons in particular circumstances have forfeited that common right, and have been declared ineligible *for that parliament* by a vote of the house of commons, or *for ever* by an act of the legislature." *Id.* at *176 (footnotes omitted) (emphasis in original).

Blackstone justified the result in the *Wilkes Case* in a more extensive analysis in a pamphlet entitled *The Case of the Late Election for the County of Middlesex Considered on the Principles of the Constitution, and the Authorities of Law* (hereinafter *Middlesex Election*), which was reprinted in a compilation entitled *An Interesting Appendix to Sir William Blackstone's Commentaries on the Laws of England* (Philadelphia 1773). In this pamphlet, Blackstone canvassed in some detail a large number of precedents, including most of those discussed in Appendix D, as well as a number of others.

Blackstone's pamphlet, together with the *Commentaries*, undoubtedly served to inform American lawyers and political leaders of the long list of precedents establishing the House of Commons' traditional power to judge qualifications. It was with the knowledge of this long-standing tradition that the Framers wrote into the Constitution that each House shall have the power to judge the qualifications of its members and to expel them.

We do not suggest that the Framers approved of the particular actions which the Commons took in expelling and excluding Wilkes, or the grounds upon which it relied. But significantly, and with the full knowledge of how those powers had been employed as to Wilkes, they expressly conferred upon the houses of the American legislative branch the traditional exclusive powers of each house of Parliament to judge the qualifications of its members, to discipline them for misconduct, and to expel them.

(b) *The American Colonial and Early State Experience.*

We have traced in the English Parliament the growth of the doctrine that a legislature has the inherent power to judge the qualifications of its members and to discipline them for misconduct. The same development had its parallel in the American colonial legislatures. The first legislative body to appear in the new world was the House of Burgesses of Virginia, which first convened on July 30, 1619. On that very day, it commenced to judge the qualifications and elections of its members and excluded two of those members, JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA: 1619-1659, at 4-5 (1950), even though the Royal Commission establishing the House of Burgesses did not expressly give it the power to judge the qualifications of its members. *See* 7 THORPE 3810 & n. *a*.

Throughout the colonial period, the legislatures of the colonies

> "not only claimed the right to judge of the commonly recognized qualifications, such as age, residence, and property holding, but placed further restrictions on the voters' rights of representation by the reaction of the assembly itself to the personal conduct of individual men. The wide-spread acceptance of the belief

that such power belonged to the legislature was as great in the colonies as in England." CLARKE 198.*

See also id. at 195 n.58; GREENE 198-99.

The charters of several of the colonies expressly provided that the assembly should possess the power to judge the qualifications of its members. *See, e.g., Fundamental Orders of Connecticut,* par. 9 (1638), in 1 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 24 (Trumbull ed. 1850); New York *Charter of Liberties and Privileges of 1683,* in 9 ENGLISH HISTORICAL DOCUMENTS 229 (Jensen ed. 1955); Pennsylvania *Charter of Liberties of 1701,* in 2 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 58 (1852). Significantly, neither the New York nor the Pennsylvania charters set forth any specific qualifications for membership.

In nine of the 11 state constitutions adopted prior to the Constitutional Convention of 1787, the houses of the state legislatures were expressly, or by implication, given the jurisdiction to judge the elections and qualifications of their members.** The other two of the 11 state constitutions, like the colonial charters in the two remaining states, had no provision whatsoever on this matter, quite arguably indicating an intent not to depart from the Anglo-American practice described above.†

In only two of those constitutions—Massachusetts and New Hampshire—were provisions included which directly limited the assembly's power to judge qualifications. The

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* Other examples from the colonial legislatures are collected in Appendix D, at 28-38.

** *See* Appendix B; Appendix D at 39.

† *See* Appendix D at 39.

Massachusetts constitution of 1780 provided that "the house of representatives shall be the judge of the returns, elections, and qualifications of its own members, *as pointed out in the constitution*. . . ." MASS. CONST. ch. I, ¶ III, art. v (1780) [emphasis added]. The constitution of New Hamshire, which appears to have been copied from Massachusetts, contains language substantially similar to that of Massachusetts, N. H. CONST. part II (1784). As can be seen from this language, the lower houses of Massachusetts and New Hampshire, in judging the qualifications of their elected members, were restricted to those specifically enumerated in their constitutions.*

The early constitutions of three other states—Pennsylvania, Delaware and Maryland—contained restrictions on the power to expel, which arguably had the effect of limiting the exercise of the power to judge qualifications. Each constitution provided that a member could not be expelled a second time for the same cause. PENN. CONST. ch. II § 9 (1776); DEL. CONST. art. 5 (1776); MD. CONST. art. X (1776). It seems reasonable to surmise that it was the intent of the framers of those constitutions to prevent the legislatures from disqualifying an expelled member from reelection, as Parliament and the colonial legislatures had done. In doing so, they may well have had in mind the *Wilkes Case*, which was at that time relatively recent.

We have found reference to only two exclusion or expulsion cases during the eleven years between the Declaration of Independence and the Constitutional Convention of 1787.** In 1780 the Virginia Assembly excluded John

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* *See* Appendix D at 39-41.

** In part this is attributable to the fact that fewer of the records of legislative proceedings during that period have been published.

Breckenridge on the ground that he was a minor, WARREN 423 n.1, even though there were no provisions in the Virginia Constitution requiring members to have attained their majority or expressly empowering the houses of the legislature to judge their members' qualifications.

The second case is particularly interesting because of the attention it commanded and because it occurred only four years before the Constitutional Convention of 1787. In 1783, the General Assembly of Pennsylvania excluded a member for frauds committed while a commissioner of purchases, pursuant to their power to judge qualifications. PENN. CONST. PROC. 88-89 (1825). The Pennsylvania Council of Censors discussed the case at length in their report, adopted in 1784. *Ibid.**

(c) *The Constitutional Convention of 1787.*

It is apparent from the foregoing that when the Constitution Convention met in 1787, the phrase "judge the qualifications", *without express language of restriction,* had become a term of art with a well-defined and widely understood meaning: the legislature had exclusive discretion to exclude or expel members who, by reason of personal character or conduct, had demonstrated themselves unfit to

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* Professor Warren appears to have been unaware of this Pennsylvania case. For he states, as petitioners emphatically point out (Br. 34) that "there is, so far as appears, no instance in which a State Legislature, having such a provision in its Constitution, undertook to exclude any member for lack of qualifications other than those required by such Constitution". WARREN 424. Indeed, Professor Warren's statement seems to imply that he was equally unaware of the many colonial cases which had transpired prior to the Revolution.

Obviously, Professor Warren did not have the benefits, now available to all, of Professor Clarke's thorough and scholarly study of colonial precedents.

undertake the responsibilities of membership. The actions of the Convention of 1787 indicated a clear intent to adhere to and not deviate from the well-established meaning of that phrase.

The Convention, having deliberated since May 25, 1787, adjourned on July 26, after referring its proceedings to the Committee of Detail, 2 FARRAND 128. It was in that Committee that the language of article 1, section 2, clause 2, began to take shape. *See id.* at 178. Edmund Randolph had made an outline for discussion in committee of the provisions which the Constitution should contain, based upon the resolutions of the Convention. Each item in the document is either checked off or crossed out, indicating that it was used in the preparation of subsequent drafts. *Id.* at 137 n.6. The item dealing with qualifications of members of the House of Representatives reads as follows (matter in italics crossed out; matter in parentheses represents changes made by Randolph):

> "5. The qualifications of (a) delegate(s) shall be the age of twenty five years at least, and citizenship: *and any person possessing these qualifications may be elected except*" *Id.* at 139.

Had the parenthetical language been adopted, it would have suggested an intention to repudiate the legal basis for the English and American precedents, including the *Wilkes Case*. When the clause was reported to the Convention, however, the parenthetical language of restriction had been eliminated. *Id.* at 178. It thus seems clear that the Committee on Detail considered and expressly rejected language which probably would have imposed a limitation upon the historic power to judge qualifications.

The clause remained in affirmative form when it was submitted to the Committee of Style on September 10, *id.*

at 565. When the Committee of Style reported out the clause on September 12, however, it had been recast in the negative form in which it now appears, *see id.* at 590. It was the pen of Gouverneur Morris, a lawyer from Pennsylvania and member of the Committee of Style, *id.* at 553, which gave "[t]he *finish* . . . to the style and arrangement of the Constitution", 3 *id.* at 499. Morris stated that he had "rejected redundant and equivocal terms" so as to make the Constitution "as clear as our language would permit". *Id.* at 420. It is, therefore, noteworthy that he recast that clause into the negative form which Blackstone used when listing "standing incapacities", above and beyond which the House of Commons could adjudge a member incapable of sitting for other reasons. 1 BLACKSTONE, COMMENTARIES *163, *176 (4th ed. 1770 and subsequent citations). If it had been the intent of the Framers to limit the House's power to that of judging the "qualifications" set forth in article I, section 2, then the change made by the Committee of Style, particularly in light of the wide circulation of the *Commentaries* in America, made the language more—not less—equivocal. Thus, it is fair to conclude that this change was effected to make clear that the Framers intended only to prescribe the standing incapacities without imposing any other limit on the historic power of each house to judge qualifications on a case-by-case basis.*

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* Only a few years after the Constitutional Convention, John Randolph cogently explained the significance of that change:

> "If the constitution had meant (as was contended) to have settled the qualification of members, its words would have naturally run thus: 'Every person who has attained the age of twenty-five years and been seven years a citizen of the United States, and who shall, when elected, be an inhabitant of the State from which he shall be chosen, shall be eligible to a seat in the House of Representatives.'" Quoted in *Case of Brigham H. Roberts,* H.R. REP. No. 85, pt. 1, 56th Cong., 1st Sess. 13 (1900).

The Committee of Detail had also reported out a provision which would enable the legislature to establish uniform qualifications for membership with regard to property. 2 FARRAND 179. It is largely upon the rejection of that provision by the Convention that Professor Warren bases his conclusion that the two houses can judge only age, citizenship and inhabitancy. *See* WARREN 420. "For", states Warren, "certainly [the Convention] did not intend that a single branch of Congress should possess a power which the Convention had expressly refused to vest in the whole Congress". *Id.* at 421. But an analysis of the action taken by the Convention on that clause, in light of the English and colonial background against which the Framers were writing, demonstrates that in rejecting the clause the Convention was merely depriving Congress of the power to pass laws creating new "standing incapacities" and not the power of each house to judge qualifications and exclude or expel on grounds of individual personal misconduct.

When the Convention considered that clause as reported out by the Committee of Detail, *i.e.*, that Congress be empowered to establish prospective "uniform qualifications . . . with regard to property", Madison made his oft-quoted speech:

> "Mr. [Madison] was opposed to the Section as vesting an improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect. In all cases where the representatives of the people will have a personal interest distinct from that of their Constituents, there was the same reason for being

> jealous of them, as there was for relying on them with full confidence, when they had a common interest. This was one of the former cases. It was as improper as to allow them to fix their own wages, or their own privileges. It was a power also, which might be made subservient to the views of one faction agst. another. Qualifications founded on artificial distinctions may be devised by the stronger in order to keep out partizans of a weaker faction." 2 FARRAND 249-50 (footnotes omitted).

Thus, when read in the context in which it was made (both Warren and petitioners, it should be noted, take this speech out of context and place it after Morris' motion, discussed below, WARREN 420, Br. 30-32), it becomes clear that Madison was directing his argument to the proposition that Congress should have the unlimited power to establish "standing incapacities" in an area which had traditionally been the subject of legislation in both England and the colonies. *See* 1 BLACKSTONE, COMMENTARIES *176; WARREN 416-17. It is equally clear that, in speaking of the threat of converting a republic into "an aristocracy or oligarchy", Madison's reference was to the property requirements which had been imposed as restrictions upon membership in Parliament and which, unlike the power to judge qualifications, had in fact been used to keep "an aristocracy or oligarchy" in power, as Blackstone candidly notes.* It was after, not before (*cf.* Br. 30-31), this speech by Madison that a motion

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* "That every knight of a shire shall have a clear estate of freehold or copyhold to the value of six hundred pounds per annum, and every citizen and burgess to the value of three hundred pounds; except the eldest sons of peers, and of persons qualified to be knights of shires, and except the members for the two universities: *which somewhat balances the ascendant which the boroughs have gained over the counties, by obliging the trading interest to make choice of landed men . . . .*" 1 BLACKSTONE, COMMENTARIES *176 (emphasis added).

was made by Gouverneur Morris to strike out "with regard to property" in the proposed clause, which would have given Congress the power to establish unlimited "uniform qualifications". 2 FARRAND 250. In response to that motion, Madison

> "observed that the British Parliamt. possessed the power of regulating the qualifications both of the electors, and the elected; and the abuse they had made of it was a lesson worthy of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or Religious parties." *Id.* at 250.

Once again these remarks of Madison were addressed to a clause which, if enacted, would have given to Congress the power to establish, without limitation, any new "standing incapacity" which the majority of the moment thought desirable. It was Parliament's abuse of this power in its legislative enactments, not a single House's use of the power to judge individual qualifications, to which he was speaking. High on the list of those abuses in Madison's mind must have been the Parliamentary Test Act (30 Car. II st. 2, c. 1 (1678)) which had excluded Catholics as a group from Parliament.* It seems at least much more plausible that this precedent was the "lesson" to which Madison referred, not the *Wilkes Case* as Warren suggests and petitioners vehemently argue. WARREN 420 n.1; Br. 32 n.6, 35 *et seq.***

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* That such statute was in the minds of the Framers is indicated by the prohibition contained in article VI, section 3, which was not contained in the draft reported out by the Committee on Detail, 2 *id.* at 188, but was introduced by Pinckney on August 20, *id.* at 342, ten days after Madison's speech.

** It should be noted that the expulsion of Wilkes was by the House of Commons which, acting alone, did *not* possess the power to "establish uniform qualifications for membership" and did not purport to act under any such power.

The provisions giving to each house the power to judge the qualifications of its members first appeared in a draft prepared by James Wilson, which was used in the Committee of Detail. 2 FARRAND 155. Gorham, a member of the Committee, had been quite active in the Massachusetts constitutional convention, which had adopted a provision limiting the power of a house of the legislature to judging those qualifications "as pointed out in the constitution", *see* p. 77-78, *supra*. Moreover, we have the testimony of another member of the committee, Edmund Randolph, that "the Constitution of Massachusetts was produced . . . in the grand Convention". 3 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 368 (1876). But the limitation contained in the Massachusetts constitution was not adopted, and the "judge qualifications" clause was reported out of the Committee of Detail in the form in which it now appears in the Constitution, 2 FARRAND 180, and adopted by the Convention "nem. con.", *id.* at 254.

If Madison had meant, as petitioners argue, to restrict the power to judge qualifications to those specified under the Constitution, and to deny the power to expel or exclude for reasons of unfitness or personal misconduct, it is strange that he did not speak to the point or suggest changes. Instead, he merely moved to insert the requirement of a two-thirds vote for expulsion.

The power to expel was first set forth in the draft prepared by Wilson, referred to above, in the following language:

> "Each House may expel a Member, *but not a second Time for the same Offense.*" *Id.* at 156 (emphasis added).

By the time the clause was reported out by the Committee of Detail, the italicized language had been excised, *id.* at 180. Thus, the Committee of Detail considered and rejected yet another provision which would have limited the power of each house of Congress in a manner which would have repudiated in part the decision in the *Wilkes Case.** As reported out by the Committee of Detail, the only change made in the clause by the Convention was the insertion, on Madison's motion, of the phrase "with the concurrence of ⅔" between the words "may" and "expel". *Id.* at 254.**

Thus the Convention considered and rejected at least two clauses (the Randolph restriction and Pennsylvania variation) and probably a third (the Massachusetts variant), which would have repudiated, in whole or in part, the English and American precedents, including the *Wilkes Case.* On the other hand, the acts of the Convention in rejecting provisions which would have given to Congress the power to create new "standing incapacities" do not, in our analysis, really bear on the question. Both Parliament and the colonial legislatures had treated the two powers as separate and distinct, and there is no indication that the Convention thought otherwise.

(d) *The Ratification Period.*

Given the long and widespread acceptance in Anglo-American law of the power of legislative bodies to judge

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* Neither "Wilkes" nor *"Wilkes Case"* appears in the index to *Farrand* (4 FARRAND 127, 226), although other names mentioned in the debates do, *e.g.*, "Blackstone", "Bolingbroke", and "Bowdoin" (*id.* at 134-35). Therefore, to the extent that our present records are complete, Wilkes was not discussed in the Convention.

** It seems much more plausible that Madison would have had the *Wilkes Case* in mind here than when considering Morris' motion, *see* pp. 83-84, *supra,* since Wilkes was "expelled" from the House of Commons. *See* p. 73, *supra.*

qualifications beyond the standing incapacities and to exclude or expel Members, it is not surprising that our review of the ratification proceedings in the several states, as set forth in Elliot's *Debates* and the leading public commentators, has not revealed any discussion of article I, section 5, or of the scope of the power to judge qualifications and to exclude or expel conferred thereby.* The power simply was not controversial.

2. *The Congressional Experience*

The above-mentioned power of the House of Commons and of the colonial and early state legislatures has been recognized and carried forward by both houses of the Congress. This experience has been summarized by Professor Chafee in his book *Free Speech in the United States.* There he discusses the two "extreme views" of the houses' powers to judge qualifications (*i.e.,* either the House may "blackball" any member whom it chooses or the House has no power to judge any "qualifications" beyond those listed in the Constitution). He concludes:

> "The arguments against both of the extreme views mentioned are so strong that the actual practice takes an intermediate ground. As to elected persons satisfying all the requirements in the Constitution, we are

* Petitioners' suggestion that the Constitution would not have been ratified unless the Framers limited the power of each House to judge qualifications is, in our view, erroneous. We have found no discussion of the issue either in the state ratification conventions or in the principal pamphleteers and commentators of the period. The examples cited by petitioners, Br. 46-57, in the conventions of New York, Pennsylvania and Virginia, were directed to other issues, namely the power to impose new standing incapacities. Significantly, the constitutions and practices of those states placed no limitation on the power of legislative bodies to adjudge an individual as unqualified because of his personal misconduct, although in Pennsylvania, he could not be expelled a second time for the same offense. *See* Appendix D at 28-32, 36-37, 40-43.

not forced to choose between giving the House absolute power to unseat whomever it dislikes, and giving the voters absolute power to seat whomever they elect. A third alternative has been adopted, fairly close to the second view. The constitutional qualifications ordinarily suffice; but Congress has rather cautiously imposed some additional tests by statute, and the House of Representatives or the Senate has probably added a very few more qualifications by established usage (a sort of legislative common law) to cover certain obvious cases of unfitness." CHAFEE 257.

In those cases of obvious unfitness, both houses have excluded or expelled members-elect or members.* Especially apt is the case of B. F. Whittemore. 1 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 464 (1907) [hereinafter Hinds]; 2 HINDS § 1273; Legislative Reference Service, *Precedents of the House of Representatives Relating to Exclusion, Expulsion and Censure* 48, 163-64 (1967) [hereinafter LRS]. Whittemore, while a Member of the House from South Carolina, was found by the House to have sold appointments to the military and naval academies. Before a vote could be taken on expulsion, Whittemore resigned. He was then re-elected, and the House excluded him by a vote of 130 to 24. *Ibid;* CONG. GLOBE, 41st Cong., 2d Sess. 4674 (1870).

Another case involving misuse of public office for personal gain is that of Frank L. Smith of Illinois. SENATE CASES 122-23. Smith was excluded from the Senate because it found that, while a member of a state agency regulating utilities, he accepted large campaign contributions from Samuel Insull and because Smith had made excessive campaign expenditures. The vote in favor of exclusion was 61 to 23. *Id.* at 123.

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* Those cases are summarized in Appendix C hereto.

There are other instances of exclusion for actions evidencing moral turpitude. Senator William Lorimer of Illinois was excluded because the Senate found that members of the state legislature had been bribed to obtain his election. *Id.* at 100-01. William S. Vare of Pennsylvania was excluded from the Senate because the Senate found he had engaged in acts of corruption and fraud in the primary prior to his election to the Senate. *Id.* at 119-22. George Q. Cannon of the Territory of Utah was excluded because he was an admitted polygamist in open violation of a federal statute. 1 HINDS § 473; LRS 49. Brigham Roberts of the State of Utah was excluded because he had been convicted for violating the polygamy statute. 1 HINDS §§ 474-80; LRS 65-108. Victor Berger of Wisconsin, at the time of exclusion, had been convicted for sedition (6 CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 56-59 (1935) [hereinafter CANNON]; LRS 110-22), and subsequently, when his conviction was reversed on appeal and prosecution of the charges dropped, Mr. Berger was re-elected and admitted to the House (CHAFEE 168 n.30).

The most recent prior instance in which either house has considered excluding a single member-elect was the case of Theodore G. Bilbo of Mississippi. That was in 1947, when Mr. Powell was a Member of Congress. CONGRESSIONAL DIRECTORY, 80th Cong., 1st Sess. 164 (1947). Senator Bilbo, who had served 12 years in the Senate, was not sworn in at the opening of the 80th Congress, pending a Senate investigation of charges that he had accepted substantial gifts from war contractors and that he had attempted to prevent Negroes from voting in a primary. Senator Bilbo's credentials were tabled, and a final adjudication made unnecessary by his death. SENATE CASES 142-44.

Petitioners discuss at some length (Br. 73-97) selected instances in which a question arose as to the qualification

of a member of the House or Senate, for reasons other than age, citizenship and inhabitancy, and the legislative body decided that he should be seated. We agree that the precedents cited by petitioners are "important and persuasive" (Br. 73), but their significance lies neither in the decisions reached nor in the rhetoric in which the arguments were cloaked. They are important because in each instance the House or Senate took jurisdiction over the case, conducted an investigation and deliberated the issues. Such action clearly implies that were they to find the member not to be qualified, they alone had the power to act upon that finding.

Mr. Powell's awareness and affirmative acceptance of the power of each house to exclude a member-elect is underscored by his vote upon the resolution regarding the Mississippi Members in 1965. There, in response to a challenge to the entire Mississippi delegation's taking the oath, a resolution was offered which would have dismissed the challenge and seated the delegation. Mr. Powell voted against that resolution. 111 CONG. REC. 24921 (1965).

3. *This Court's References to the Constitutional Limitations Upon Qualifications for Membership in the Congress.*

Petitioners contend that three decisions of this Court establish the proposition that the qualifications of article I, section 2—age, citizenship and inhabitancy—are exclusive. But this Court has never so held and its pronouncements tend to the opposite conclusion. Thus, although these three cases contain dicta which may suggest that Congress may lack the power to create new "standing incapacities" by statute, they do not even question the exclusive power of either house of Congress to adjudge an individual member to be unqualified by reason of his personal misconduct of the sort on which the House acted here.

First, *Newberry* v. *United States,* 256 U.S. 232, held that Congress lacked the power to regulate primary elections and reversed a conviction for conspiracy to violate a federal statute regulating expenditures by candidates in primary elections. In discussing the scope of the authority given Congress under section 4 of article I to make or alter state regulations regarding the time, places and manner of holding elections for Senators and Representatives, the Court quoted Hamilton's remarks in *The Federalist* emphasizing that Congress could not establish preferred classes (*i.e.,* by establishing a uniform property qualification) for membership in either of its houses. But the Court also went on to point out that each house's power to judge qualifications gave Congress the "power to protect itself against corruption, fraud or other malign influences", *id.* at 258. That view was concurred in by Justices Pitney, Brandeis and Clarke, *id.* at 284-85, who thought the majority's conclusions as to lack of congressional power to regulate the primaries were inconsistent with the power of either house to judge the elections and qualifications of its members. *Ibid.*

Second, *United States* v. *Classic,* 313 U.S. 299, resolved that inconsistency by narrowly confining *Newberry* to its facts and holding that article I, section 4 granted Congress the power to regulate primary elections which were necessary steps in the choice of candidates for election to the Congress and which controlled that choice. Accordingly, the Court reversed a demurrer to an indictment under two federal civil rights acts for conspiracy to deprive qualified voters who voted in a primary election of their right to have their ballots cast for the candidates of their choice, to deprive candidates of their right to run for election to the Congress, and to have votes cast in their favor counted for them. In the course of its opinion, the

Court stated that the people's free choice of representatives in Congress was subject to the restrictions found in sections 2 and 4 of article I and "elsewhere in the Constitution". *Id.* at 316. But that statement is perfectly consistent with the view that each house has the power to adjudge an individual Member as unqualified in a particular case by reason of his misconduct pursuant to the Constitution's "judge qualifications" clause. This is confirmed by the fact that the Court in *Classic* referred with approval to the two houses' exercise of their respective power to judge elections, returns and qualifications. 313 U.S. at 319 n.3.

Third, *Bond* v. *Floyd, supra,* decided only that the exclusion of Julian Bond from the Georgia Legislature because of his political views violated the first and fourteenth amendments. In *Bond* the Court was exercising the federal power under the Supremacy Clause to invalidate state actions that infringe federal constitutional rights. The Court had no occasion to consider its power to pass on the actions of either house of Congress in judging the qualifications of its members, punishing them for misconduct, or expelling them. This Court noted, however, that both Madison and Hamilton had anticipated the oppressive effect on freedom of speech which would result if the legislature could pass judgment on a legislator's political views. It pointed out that Madison had opposed a proposal allowing Congress to "establish qualifications in general" and that he had said that qualifications "ought to be fixed by the Constitution" rather than "regulated" by the legislature as the British Parliament had done. It also noted Hamilton's comment in *The Federalist* that qualifications of the elected are to be found and fixed in the Constitution and are unalterable by the legislature. 385 U.S. at 135-36 n.13.

As we have already pointed out, those remarks of Madison were directed against the proposition that the Congress should have the power to pass laws establishing new general qualifications for membership in either house (*i.e.*, creating additional requirements, such as property ownership, over and above the three requirements of age, citizenship and inhabitancy). The same is true of Hamilton's remarks.* They were not adverting to the power of legislative bodies, well-recognized in the Colonies and early state legislatures, and continued by the Framers, to exclude or expel, on an individual basis, persons who were found unfit to sit because of personal misconduct. We recognize that *Bond* could be read as questioning the substantive power of either house of Congress to exclude a member-elect because of the exercise of his rights of free speech or religion, assuming for the moment that the Court would have power to consider such questions in a suit against the House or its Members.** But, unlike *Bond,* no such question is involved here, for the House's judgment of exclusion is not grounded on Mr. Powell's political or religious beliefs or on his exercise of any constitutional right. Accordingly, this Court's dictum in *Bond* does not govern this case, particularly since such a reading of *Bond* would conflict with other decisions of this Court which recognize the exclusive jurisdiction of each house to judge qualifications and to exclude or expel members for reasons other than age, citizenship and inhabitancy. *See Baker* v. *Carr,* 369 U.S. at 242 n.2 (Douglas, J., concurring); *Hannah* v. *Larche,* 363 U.S. 420, 444 n.21, 480-81; *Barry* v. *United States ex rel. Cunningham,* 279 U.S. at 613; *Reed* v. *County Comm'rs,* 277 U.S. at 388; *Jones* v. *Montague,* 194 U.S. at 153; *In re Chapman,* 166 U.S. at 668-70.

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* *See* Appendix D at 59-60.

** *But see* Point I *supra.*

B. *The Exclusion of Mr. Powell Was a Decision Equally Supported by the House's Power To Expel a Member Upon the Vote of Two-Thirds.*

An alternative constitutional basis for the exclusion of Mr. Powell from the 90th Congress, adopted by Judge McGowan below, is the provision of article I, section 5, giving each house the power, upon the concurrence of two-thirds, to expel a Member. As noted above, in the early practice in the House of Commons, in particular the *Wilkes Case,* and in the colonial and early state legislatures, there was often no distinction made between exclusion and expulsion, and the word "expulsion" was often used to cover both situations.

Whatever limitations article I, section 2 arguably imposes upon the House's power to judge qualifications under article I, section 5, it has never been disputed that the authority of the House to expel on the vote of two-thirds is committed solely to its discretion. In particular, there can be no dispute that the expulsion power can be exercised for a host of reasons relating to past and current behavior. As this Court itself has stated: "The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member." *In re Chapman,* 166 U.S. at 669-70. Here the Select Committee's findings, expressly recited in House Resolution 278 and not contested by petitioners, support the judgment of the House that Mr. Powell's conduct was inconsistent with the trust and duties required for membership in that body.*

*The power to exclude a member upon grounds such as those present in this case finds its analogues in the power to expel a member and the power of impeachment. The power of the Senate to expel a member on similar grounds was early upheld in the case of *William Blount,* SENATE CASES 3, who, in 1797, was expelled and held to be unworthy of a continuance of his public trust in the Senate for having conspired with a British agent in a plan to seize Spanish Florida and Louisiana, and at least one member-elect of the House was expelled by a two-thirds vote for prior misconduct, instead of being excluded. *See John B. Clark,* 2 HINDS §1262, Appendix C.

The resolution excluding Mr. Powell was duly adopted by a vote in excess of two-thirds of the 434 Members—307 to 116. 113 CONG. REC. H1956-57 (daily ed. Mar. 1, 1967).* Some Members, at least, considered exclusion and expulsion coextensive in the context at hand.** While theoretically a Member may have to be seated before he may be expelled, such formality cannot be required here, because in practical effect the two amount to the same thing and the basic constitutional requirement for expulsion—a concurrence of two-thirds—was amply satisfied. And surely the broad perimeters of article I, section 5, giving the House control over the conduct of its internal affairs, make inappropriate any judicial questioning as to the technical regularity of the parliamentary procedure involved.

Petitioners' entire argument on the merits therefore rests upon the slimmest of reeds. At most their contention is that the action of the House was not absolutely regular. If the House had taken the technical step of voting to seat Mr. Powell and then immediately expelling

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* Some have suggested that a two-thirds vote would not have been forthcoming if the Speaker had not ruled that a majority vote would suffice. *E.g.*, Note, *The Power of a House of Congress To Judge the Qualifications of Its Members*, 81 HARV. L. REV. 673 n.1 (1968). Yet, such a suggestion can be supported only by speculations into the possible motivation and subjective purpose of each Member of the House who voted on the resolution. Such speculations cannot be undertaken or indulged. *United States* v. *O'Brien*, 391 U.S. at 383-86; *Barenblatt* v. *United States*, 360 U.S. 109, 132-33; *Daniel* v. *Family Ins. Co.*, 336 U.S. 220; *Arizona* v. *California*, 283 U.S. 423, 455 and the cases there cited. The objective fact is that a two-thirds vote was forthcoming, and beyond that fact this Court cannot go. *See also* A. 94 (McGowan, J., concurring).

** *See, e.g.*, 113 CONG. REC. H1942 (Mr. Curtis), H1944-45 (Mr. Celler) (daily ed. Mar. 1. 1967).

him by the two-thirds vote that in fact was accomplished, petitioners would have no argument left at all.

Respondents submit that the House has effectively met the stated requirement for expulsion and, if it has not, the deficiency in its resolution is merely technical and ministerial and hardly the occasion for judicial interference with the legislative branch in this case. As Judge McGowan stated, concurring in the court below,

> ". . . Powell's cause of action for a judicially compelled seating thus boils down, in my view, to the narrow issue of whether a member found by his colleagues, after notice and opportunity for hearing, to have engaged in official misconduct must, because of the accidents of timing, be formally admitted before he can be either investigated or expelled. The sponsor of the motion to exclude stated on the floor that he was proceeding on the theory that the power to expel included the power to exclude, provided a ⅔ vote was forthcoming. It was. Therefore, success for Mr. Powell on the merits would mean that the District Court must admonish the House that it is form, not substance, that should govern in great affairs, and accordingly command the House members to act out a charade." (A. 92-93.) *See also* A. 96-99 (Leventhal, J., concurring).

C. *Moreover, the Exclusion of Mr. Powell Did Not Infringe Any Other Constitutional Provision.*

Petitioners contend that Mr. Powell was denied due process of law, that his exclusion was a bill of attainder, and (in their brief, but not in the complaint) that it was a discrimination based upon race (Br. 98-130). These contentions lack merit.

1. *Mr. Powell Was Not Denied Due Process of Law.*

Mr. Powell's due process claim is apparently limited to the contention that the procedures followed by the House and by the Select Committee were not proper.*

Even the scope of the procedural due process claim is not easy to fathom. Petitioners apparently maintain that Mr. Powell was not accorded (1) notice of the specific charges which, if proven, would justify exclusion or expulsion; (2) effective assistance of counsel; (3) the rights of confrontation and cross-examination of adverse witnesses; (4) a decision supported by substantial evidence; and (5) the right to assert his constitutional privilege against self-incrimination. (Br. 112-19)

On their face, those contentions are without substance. Mr. Powell chose on the express advice of counsel to limit his participation in the hearings before the Select Committee, *Hearings Before Select Committee* 255, on the sole and express ground that the Committee had no jurisdiction whatsoever to inquire into anything beyond his age, citizenship and inhabitancy. *Id.* at 60-64, 109-13. As his brief submitted at the close of the hearings makes clear, Mr. Powell was advised by counsel "for that reason, *and for that reason only* . . . not to participate in the hearings of the Committee which extend beyond such limitations". *Id.* at 255 (emphasis added).

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* In the court below, Mr. Powell contended that he had been denied substantive due process because the standards of conduct by which the House judged him were not known to him beforehand. In other words, he claimed that he was not on sufficient notice that misuse of public funds, breach of public trust, contumacious evasion of lawful processes of the courts and failure to cooperate with investigations of his conduct authorized by the House might result in his exclusion or expulsion. Such a contention was without any merit, in view of the very substantial body of precedent in both Houses as a "sort of legislative common law" to cover obvious cases of unfitness, and we do not understand Mr. Powell to press that contention here. CHAFEE 257.

Mr. Powell's conduct before the Select Committee thus satisfied the strictest standards of waiver. *See Johnson v. Zerbst,* 304 U.S. 458, 464.

When the question of his seating was brought before the entire House, the body possessing the authority to adjudicate the question, Mr. Powell again chose to stay away.* Mr. Powell cannot now maintain that he was denied procedural due process with respect to proceedings in which he declined upon the advice of counsel to participate.

As Judge McGowan noted below:

> "It is argued that the misconduct cannot be assumed because Powell was denied procedural due process by his colleagues in the investigation of his activities. But no one can read the record of the Select Committee's relationships with Powell without concluding that there was no serious purpose upon Powell's part to participate in the ascertainment of the facts. This was unquestionably due to his fundamental constitutional theory that he was accountable for his conduct only to his constituents. One cannot escape the impression that any procedural problems would have been resolved satisfactorily if there had been willingness to accept the relevance of the alleged misconduct to his continuance in the House." (A. 92 n.2). *See also* A. 99 (Leventhal, J.).

In any event, however, Mr. Powell was accorded rights consistent with the precedents of the House and Senate as well as with the arguably analogous judicial precedents.

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* Mr. Powell could have participated in the debates on the Committee's Report and could even have had counsel present. *See* DESCHLER § 65.

The House is not bound by any particular set of procedures, since article I, section 5 gives it power to determine the rules of its proceedings. It has, however, attempted to accord Members, including Mr. Powell, such rights as are necessary to promote the ascertainment of truth. *See Hearings Before Select Committee* 30.

The rules of the House, as well as the Senate, followed in cases of contested elections, exclusions, and expulsions have been tailored to the nature of the case. Pure contested election cases generally resemble a civil trial* while exclusions and expulsions are often heard by investigating committees.** In exclusion and expulsion cases where the facts are extensively disputed, the privilege of cross-examination is often accorded.† Where the essential question is one of law or interpretation, on the other hand, a committee or the House may decide the question upon written statements and presentations.††

In this case, of course, the facts are not substantially in dispute. Mr. Powell never attempted to controvert the evidence of his improprieties and still does not.‡ Nevertheless, Mr. Powell received ample procedural rights from the Select Committee which investigated his qualifications.

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* *E.g., Wilson* v. *Vare,* SENATE CASES 119-22 (1927-29); *Jodoin* v. *Higgins,* 6 CANNON § 90 (1936).

** *E.g., Benjamin Stark,* SENATE CASES 34 (1862); *B. F. Whittemore,* 1 HINDS § 464; 2 *id.* § 1273 (1870); *Reed Smoot,* SENATE CASES 97-98 (1907); *Wilson* v. *Vare, id.* at 119-22 (1927-29); *Frank L. Smith, id.* at 122-23 (1927-28).

† *E.g., Phillip F. Thomas,* SENATE CASES 40 (1867-68); *William Lorimer, id.* at 100-01 (1912); *Theodore G. Bilbo, id.* at 142-44 (1947).

†† *E.g., Albert Gallatin,* ANNALS OF CONGRESS, 3d Cong., 1st Sess. 60-62 (1794); *James Shields,* CONG. GLOBE, 30th Cong. 2d Sess. App. 332 (1894); *Waldo P. Johnson,* SENATE CASES 30-31 (1861-62).

‡ *See* p. 14 note *, *supra.*

Petitioners' reliance upon judicial precedents with respect to due process is misplaced. First, none of the cited cases dealt with each house's exercise of its constitutionally delegated power to judge the qualifications of its members, to determine the rules of its proceedings, and to expel members.

Second, even assuming that the cited precedents can be relied upon, petitioners fail to recognize that, as this Court has emphasized, due process is not a fixed and immutable concept, but rather depends upon the nature and purposes of the proceedings involved. *E.g., Railway Clerks* v. *Employees Ass'n,* 380 U.S. 650, 667; *Cafeteria Workers, Local 473* v. *McElroy,* 367 U.S. 886; *Hannah* v. *Larche,* 363 U.S. at 442. Where the proceeding is investigatory rather than adjudicatory, the full panoply of formal judicial procedures need not be followed. *Hannah* v. *Larche, supra; Anonymous* v. *Baker,* 360 U.S. 287; *In re Groban,* 352 U.S. 330.

It is clear that the proceedings of the Select Committee were investigatory, rather than adjudicatory, since the Select Committee's function was limited to reporting to the House "the results of its investigation and study, together with such recommendations as it deems advisable." H.R. Res. 1.

(a) *Mr. Powell Had Ample Notice of the Charges Against Him.*

In *Hannah* v. *Larche, supra,* the Civil Rights Commission, which, like the Select Committee, had no adjudicatory powers, summoned certain voting registrars and private citizens to appear in an investigation of alleged deprivations of Negro voting rights in Louisiana. No notice of the specific charges being investigated was given, but the persons summoned did have notice of the general nature of the

inquiry. 363 U.S. at 441 n.18. This Court held that notice sufficient. *Id.* at 441-42.

It follows that the notice given to Mr. Powell was more than adequate. *See* Chairman Celler's letters of February 1 and 10, and the Chief Counsel's letters of February 6 and 11, pp. 7, 11, *supra.* And there certainly was adequate notice prior to the consideration of the matter by the House as a whole, since the Select Committee made its recommendations to the House on the basis of detailed findings of fact. REPORT OF SELECT COMMITTEE 31-32.

(b) *Mr. Powell Was Accorded the Right to Counsel.*

The right to counsel may properly be denied in investigatory proceedings without running afoul of the dictates of due process. *Anonymous* v. *Baker, supra; In re Groban, supra.*

Nevertheless, Mr. Powell was given the right to counsel. Petitioners say, however, that they were denied the right to "effective" counsel because allegedly the Select Committee did not permit his attorneys to be heard (Br. 118). The plain fact is that every time Mr. Powell's counsel asked to be heard on any matter they were accorded reasonable opportunity to speak and to file briefs. *See* pp. 7-12, *supra.*

(c) *Mr. Powell Was Given the Right of Confrontation. While He Was Not Given the Right of Cross-Examination, the Record and Circumstances of This Case Clearly Show That He Was Not Thereby Prejudiced.*

In *Hannah* v. *Larche, supra,* this Court held that the Civil Rights Commission was not required to disclose the identity of complainants and was not required to grant the right to cross-examine. 363 U.S. 441-42.* One of the prece-

* *See also Martin* v. *Beto,* 260 F. Supp. 589 (S.D. Tex. 1966), *aff'd,* 397 F.2d 741 (5th Cir. 1968); *petition for cert. filed,* 37 U.S.L.W. 3252 (U.S. Nov. 12, 1968) (No. 732); *In re McClelland,* 260 F. Supp. 182 (S.D. Tex. 1966); *United States* v. *International Longshoremen's Ass'n,* 246 F. Supp. 849 (S.D.N.Y. 1964).

dents relied upon was the Senate proceeding with respect to the seating of John Smith of Ohio. *Id.* at 444 & n.21, 480-81.

The only authority specificially relied upon by petitioners with respect to this point, *Greene* v. *McElroy,* 360 U.S. 474, is totally inapposite. In *Greene,* all that was decided was that there was no statutory or administrative basis which authorized revocation of a security clearance without affording a hearing, including the right to confront and cross-examine adverse witnesses. That *Greene* was not based upon constitutional grounds was made clear by the subsequent decision of this Court in *Cafeteria Workers, Local* 473 v. *McElroy, supra.**

Accordingly, the Select Committee was not constitutionally required either to disclose the identity of individuals who had supplied it with information or allow Mr. Powell the right to cross-examine adverse witnesses. Nevertheless, the Committee did not keep secret from Mr. Powell or his attorneys the identity of the witnesses who furnished testimony, and Mr. Powell and his attorneys made no effort to contest any of the testimony, or to avail themselves of the offer of the Committee to subpoena anyone whom Mr. Powell requested to testify. If he had requested the right to cross-examine a particular witness on a showing of need, one cannot escape the impression, as Judge Leventhal intimated, that the right would have been granted.

(d) *The Select Committee's Recommendations and the House's Action Are Supported by Substantial Evidence.*

Petitioners, as a further portion of their due process argument, contend that inadmissible hearsay was received

* *See also Hyser* v. *Reed,* 318 F.2d 225 (D.C. Cir. 1963), *cert. denied,* 375 U.S. 957; *Dixon* v. *Alabama Bd. of Educ.,* 294 F.2d 150 (5th Cir. 1961), *cert. denied,* 368 U.S. 930.

in evidence and apparently that the findings of the Select Committee and the action of the House were not supported by substantial evidence.

Petitioners' unspecified contention as to hearsay is frivolous. The admission of hearsay evidence before the Select Committee did not violate due process. *Cf. Costello* v. *United States,* 350 U.S. 359. Moreover, Mr. Powell's attorneys did not object to the admission of any evidence on hearsay grounds and thus have waived their right, if any, to object. 1 WIGMORE, EVIDENCE § 18 (3d ed. 1940).

Petitioners' apparent general contention that the findings of the Select Committee were unsupported by substantial evidence is even less tenable. They do not point to any evidence in the *Hearings* that conflicts with the Committee's findings and do not suggest, even now, any evidence to rebut those findings.

(e) *Mr. Powell's Exclusion Was Not Punishment for Asserting His Constitutional Privilege Against Self-Incrimination.*

Petitioners also contend that the House's action is unconstitutional on the ground that it is punishment for Mr. Powell's assertion of his constitutional right to remain silent (Br. 118), citing *Slochower* v. *Board of Educ.,* 350 U.S. 551, a case involving the privilege against self-incrimination. Mr. Powell, however, never invoked the privilege against self-incrimination and did not refuse to testify on that ground. His argument is thus frivolous.

2. *House Resolution 278 Is Not a Bill of Attainder.*

Petitioners argue that House Resolution 278 is a bill of attainder (Br. 98-111), erroneously assuming that the doctrine of separation of powers assigns all adjudicatory

powers to the courts under article III. Each house of Congress, however, under article I, has expressly been given the power to *judge* the qualifications of its members as well as to punish its members for disorderly behavior and, with the concurrence of two-thirds, to expel a member. None of the cases cited by petitioners involved a legislature's exercise of these express judicial powers and are thus irrelevant. *See United States* v. *Brown,* 381 U.S. 437; *United States* v. *Lovett,* 328 U.S. 303; *Ex parte Garland,* 4 Wall. 333; *Cummings* v. *Missouri,* 4 Wall. 277; *cf. United States* v. *O'Brien,* 391 U.S. at 383 n.30.*

The argument of petitioners was answered long ago by Alexander Hamilton in *The Federalist.* Referring to the analogous power of the Senate "as a court for the trial of impeachments" (THE FEDERALIST No. 65, at 439 (Cooke ed. 1961)), Hamilton defended the assignment of the impeachment power to the Senate (*id.* at 439-45), and specifically refuted the argument that the assignment of that power to the Senate was a deviation from the doctrine of separation of powers. He said,

> "[It is objected] . . . that the provision in question confounds legislative and judiciary authorities in the same body; in violation of that important and well established maxim, which requires a separation between the different departments of power. The true meaning of this maxim has been discussed and ascertained in another place [Nos. 47-52], and has been shown to be entirely compatible with a partial

* A legislature's judging of the qualifications of a member-elect was not regarded as an act of attainder or an act of pain and penalties at the time the Constitution was drafted. *Compare* 1 BLACKSTONE, COMMENTARIES *162-63, *175-77 *and* 4 *id.* *259 (4th ed. 1770).

intermixture of those departments for special purposes, preserving them in the main distinct and unconnected. *This partial intermixture is even in some cases not only proper, but necessary to the mutual defense of the several members of the government, against each other.*" *Id.* No. 66, at 445 (emphasis added). *See also* CHAFEE 253; 1 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 742-45 (4th ed. Cooley 1873).

3. *Mr. Powell Was Not Excluded From the 90th Congress Because of His Race.*

Petitioners' contentions that the exclusion of Mr. Powell was motivated by racial prejudice are, as Judge McGowan noted below, "so purely conclusory in character as, under elementary pleading concepts, not to require a hearing on the merits" (A. 92).

More importantly, such contentions are patently unsupportable, by inference or otherwise. Mr. Powell was excluded for the reasons stated in House Resolution 278, and for no other reasons. This Court cannot disregard those unchallenged reasons for the action of the House and probe for other concealed motivations that are claimed to have led each Member to vote as he did. For as this Court has emphasized on many occasions, the integrity of legislative, administrative, and judicial processes preclude probing "the mental processes" by which legislators and judges decide matters. *E.g., United States* v. *O'Brien,* 391 U.S. at 382-86; *Pierson* v. *Ray,* 386 U.S. at 554; *United States* v. *Morgan,* 313 U.S. 409, 422; *Arizona* v. *California,* 283 U.S. at 455; *Fletcher* v. *Peck,* 6 Cranch 87. The Speech or Debate Clause also squarely precludes such an inquiry.

Furthermore, petitioners' asserted constitutional bases—the thirteenth, fourteenth and fifteenth amendments—are frivolous as applied to the facts of this case.

First, "The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery." *Civil Rights Cases*, 109 U.S. 3, 24, or to the "badges and incidents of slavery", *e.g.*, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437-43. The exclusion of Mr. Powell obviously has nothing to do with slavery, and since there is absolutely no showing of any intent to discriminate against Negroes as a class, there is no colorable "badge or incident of slavery" at issue.

Second, the fourteenth amendment has no application whatsoever to the federal government. And even if petitioners' reference to the fourteenth amendment is viewed as a reference to some sort of fifth amendment equal protection standard, they have failed to allege either a specific intent to discriminate against Negroes as a class or systematic discrimination against Negroes.

The statements, on and off the House floor, of a few Representatives opining that prejudice against Negroes was a major factor in the exclusion of Mr. Powell (Br. 125-27 n. 89, 127-29) do not establish petitioners' contention. As this Court knows: "[W]hat motivates one legislator to make a speech about a . . . [matter] . . . is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork". *United States* v. *O'Brien*, 391 U.S. at 384. Moreover, if this Court were to examine the legislative purpose or motive in excluding Mr. Powell, it would be obliged to consider not only the statements referred to by petitioners, but also the more authoritative *Report of the Select Committee*,

which makes clear that racial prejudice played no part in their deliberations. *See United States* v. *O'Brien*, 391 U.S. at 385.

Third, the fifteenth amendment prohibits only denials of the right to vote because of race, and since petitioners do not claim that House Resolution 278 expressly denies them the right to vote because of race, they do not even allege a violation of the fifteenth amendment. *See, e.g., South Carolina* v. *Katzenbach*, 383 U.S. 301; *Gomillion* v. *Lightfoot*, 364 U.S. 339; *Terry* v. *Adams*, 345 U.S. 461; *Smith* v. *Allwright*, 321 U.S. 649.

POINT III

In Any Event, the Circumstances of This Case Do Not Present an Appropriate Occasion for a Federal Court To Exercise Whatever Discretionary Power It May Possess To Afford Relief.

The remedies petitioners seek in this action—injunction, mandamus, and declaratory judgment—are not available to a litigant simply because he asserts or even establishes an underlying right. Such remedies are given only as a matter of sound judicial discretion, where the circumstances are compelling. A determination to withhold such relief will not be set aside unless it constitutes an abuse of discretion. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148; *Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111. This is especially true of petitioners' request for declaratory relief against the House, since

> "The propriety of [such] relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of the federal judicial power."

Public Service Comm'n v. *Wykoff*, 344 U.S. 237, 243 n.41 *See also Golden* v. *Zwickler* 37 U.S.L.W. 4185 (U.S. Mar. 4, 1969).

In the circumstances of this case, it was altogether appropriate for the courts below to decline to afford any of the relief requested.

As Judge Leventhal noted below,

> "A court has a duty, in the sound exercise of discretion, to consider litigation seeking relief that raises problems of confrontation with a coordinate branch with an approach that will, wherever possible, confine relief narrowly." (A. 98)

Only circumstances of the most compelling necessity, or as Judge McGowan termed it, "the urgencies, in terms of simple justice" (A. 93-94 n.4), should induce a court to act otherwise in a case such as this. Here, there are no compelling necessities or "urgencies" that require the extraordinary relief petitioners seek.

First, petitioners have not challenged the accuracy of any of the findings of misconduct made by the Select Committee and have never proffered any evidence, either in the courts or in the House, to rebut those findings. Clearly, it was no abuse of discretion for the courts to refuse to come to the aid of a Congressman-elect whom both the Select Committee and the House itself found had improperly maintained his wife on his clerk-hire payroll, permitted and participated in improper expenditures of public funds for private purposes, refused to cooperate with Committees of the House in their lawful inquiries, and brought discredit to the House by his contumacious conduct toward the courts of New York.

Second, while the exclusion of Mr. Powell did temporarily deprive his constituents of representation in the House, that deprivation was, at least in part, perpetuated by Mr. Powell himself. After his exclusion in March of 1967, Mr. Powell was re-elected in April of 1967, but never again during the 90th Congress presented himself to represent his district.*

Third, upon the advice of counsel, Mr. Powell chose not to participate in the proceedings of the House, taking the position that neither the House nor the Select Committee had jurisdiction to inquire beyond his age, citizenship and inhabitancy. But surely, as Judge Leventhal noted below, the House had "legislative jurisdiction" to inquire into whether a Member-elect had committed acts justifying punishment or expulsion. And, pursuant to its power to determine the "Rules of its Proceedings", article I, section 5, it was authorized to conduct that inquiry prior to seating him. Against the backdrop of the potential confrontation with a coordinate branch and the courts' difficulty in molding meaningful relief, Mr. Powell's failure to participate in the proceedings led Judge Leventhal to conclude:

> "... I do not think it mandatory for a court to consider and determine the constitutional issue as he has chosen to frame it, from an erroneous premise; and specifically, I think it proper to refrain from a full determination of the merits in a case where petitioner is seeking an extraordinary remedy yet has failed to invoke to the fullest extent the remedies and procedures available within the legislative branch." (A. 101)

For these reasons alone, the decision below should be affirmed.

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* Of course, the claims asserted by Mr. Powell's constituents are unquestionably moot. *See* pp. 111-12 note * *infra*.

POINT IV

This Case May Now Be Dismissed As Moot.*

We believe that we have shown in the foregoing Points I, II and III that the courts below were correct in dismissing this action, and we submit that under those circumstances, affirmance of the dismissal would be an appropriate result, particularly since it would terminate the controversy in all its aspects. Nevertheless, we feel compelled to raise a suggestion of mootness because, wholly apart from the correctness of the result reached by the courts below, intervening events make it inappropriate now to grant the relief sought by petitioners. Time and the evolution of the political process have made this action moot and rendered the relief sought wholly academic and unnecessary. Since certiorari was granted, the 90th Congress has terminated, the 91st Congress has been convened and organized and Mr. Powell has been seated in the House of the 91st Congress. Petitioners themselves now concede, as they must, that "the remedial form of mandamus to the Speaker to require Petitioner's [Mr. Powell] seating is no longer required". Petitioners' Memorandum 16.

As against the House of the 90th Congress, however, they still seek a declaratory judgment on the constitutionality of its resolution of exclusion and an order against the Sergeant-at-Arms directing the payment of Mr. Powell's back salary. They also have asked in Petitioners' Memorandum for diverse mandatory, injunctive and declaratory relief against the House of the 91st Congress and certain of its officers, even though that body is not a party to this lawsuit and its action with respect to Mr. Powell was

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* The argument in this Point IV supplements respondents' argument in their Memorandum on Mootness filed herein on January 10, 1969.

wholly independent from the action of the prior House. *See* Petitioners' Memorandum 16.

Not one of these new claims for relief stands on any better footing than the original claims asserted in this action and in no way alters or affects the conclusion that this action is now moot.

A. *Any Declaratory Judgment Against the House of the 90th Congress with Respect to the Exclusion of Mr. Powell Would Be Entirely Academic.*

Even if declaratory relief would have been proper at an earlier stage of these proceedings, it would be inappropriate now. Such a judgment would only bind a party that is no longer in existence and would thus serve no useful purpose—it is no longer possible for Mr. Powell to be seated in the House of the 90th Congress. Under those circumstances, any declaratory judgment against the 90th Congress would be wholly empty and academic, and, hence, impermissible. As Professor Moore states:

> "It is quite clear that the Declaratory Judgment Act is not to be used as a means of securing a judicial determination of moot questions. Such would be a determination of non-justiciable issues, and it is well settled that the Act is procedural only, and that its application is restricted to cases and controversies which are such in the constitutional sense." 6A MOORE, FEDERAL PRACTICE ¶ 57.13, at 3071-72 (2d ed. 1966). *See also Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227; *Public Service Comm'n* v. *Wycoff Co., supra.**

* It is clear that what standing, if any, the petitioners other than Mr. Powell may have had no longer exists. They are currently being represented in Congress, and there is no longer any way to enable them to be represented in the 90th Congress. *Flast*

The inability of this Court to decide moot questions is, of course, well established. In *Mills* v. *Green,* 159 U.S. 651, 653, for example, this Court wrote:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal."

And only this month this Court emphasized that the declaratory judgment is limited to situations "in which there is substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of declaratory judgment". *Golden* v. *Zwickler,* 37 U.S.L.W. at 4186 (U.S., Mar. 4, 1969), citing *Maryland Casualty Co.* v. *Pacific Oil Co.,* 312 U.S. 270, 273. In *Golden,* this Court held that the unlikelihood that Mr. Multer would again be a candidate for Congress pre-

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v. *Cohen, supra; Bond* v. *Floyd,* 385 U.S. at 137 n. 14. Thus, their claims are totally moot. It should be noted, however, that all three judges below concluded that the claims of these citizens stood on no higher ground than the claims of Mr. Powell and were equally nonjusticiable and that the citizens of that district were constitutionally guaranteed the initial right to vote, not the right to have a particular representative be seated in Congress under all circumstances. (A. 76-78, 91-101). Moreover, as this Court itself has recognized, the exercise of the power to exclude or expel does not violate the rights of the electors of such a member. *Barry* v. *United States ex rel. Cunningham,* 279 U.S. 597, at 615-16.

cluded the necessary finding of "sufficient immediacy and reality" to support a declaratory judgment, even though first amendment rights were urged, and even though the case was not moot when it was originally commenced.

Likewise, this case lacks the necessary "sufficient immediacy and reality" to support a declaratory judgment. Mr. Powell's period of exclusion has expired, he is sitting in the present House, and there is no more likelihood that he will again be excluded then there is that Mr. Multer will again be a candidate. Under these circumstances, the dismissal below must either stand or this case must be treated as moot.

B. *Whatever Claim Mr. Powell Has with Respect to Back Salary Is Not Cognizable by This Court and Therefore in No Way Affects the Fact That This Action Is Moot.*

Petitioners assert that Mr. Powell's claim for back salary, if any, prevents this case from being moot, and they now seek mandamus against the Sergeant-at-Arms of the House of the 91st Congress (even though he is not a party to this action) directing him to pay Mr. Powell that sum of money. Petitioners' Memorandum 16. We note at the outset that Mr. Powell's claim for back salary has always been incidental and subordinate to his now mooted demand for seating. It thus is wholly ancillary to the primary issues of this case and should not prevent this Court from dismissing this action as moot even if the claim itself could technically be resolved in this action.

In *Alejandrino* v. *Quezon*, 271 U.S. 528, discussed at pages 5-6 of Respondents' Memorandum on Mootness, this Court refused to entertain the salary claim of an individual suspended from the Philippine Senate because that claim was incidental to the mooted issue of suspension and was "not in itself a proper subject for determination as now presented". *Id.* at 535. Notwithstanding the distinction at-

Curtis) are not even Members of the present House. It is thus not only unrealistic to state that the action of the present House "continues" the action of the 90th Congress, it is simply erroneous.

Even the record on which the House of the 91st Congress based its action was different. To be sure, the findings of the Select Committee during the 90th Congress were discussed in the House during the January 3, 1969, debate on Mr. Powell's seating, 115 CONG. REC. H4 *et seq.* (daily ed. Jan. 3, 1969). But it is significant that, although Mr. Powell was then present in the House and could have participated in the debate, DESCHLER § 65, he did not in any way contest the basic accuracy of the Select Committee's findings or the procedure by which they were reached. His continued failure in the court of the House to attempt to rebut those findings in any way,* during a de novo consideration of his case, was part of the record on which the House reached its judgment. Such judgment was independent of the judgment reached by the predecessor House two years before, not a preordained and inexorable consequence of the prior action.

Based largely on their erroneous analysis that the action of the House of the 91st Congress "continued" the action of the House of the 90th Congress, petitioners ask this Court to enter declaratory relief against the 91st Congress, Petitioners' Memorandum 16. Petitioners, however, do not suggest how such relief can be granted.

The party against whom such an order would operate is not before this Court; the respondents here are the Members of the House of the 90th Congress, individually and as represenatives of that House. The issues are also

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* Of course, Mr. Powell has never, either before the Select Committee in the 90th Congress, before the 90th House itself, or in the courts suggested for a moment that those findings are erroneous. *But see* p. 14 note *, *supra*.

different. The issue in this case is whether a federal court can entertain an action against representative Members of the House of the 90th Congress to review the decision of that House to exclude Mr. Powell. The issue raised by the action of the House of the 91st Congress, which of course was not presented or considered below, is whether the House has power to admit and simultaneously punish a Member-elect for prior personal misconduct.* Petitioners cannot in effect begin a new lawsuit against an entirely different party (the House of the 91st Congress) and interject different issues at this stage of appellate review. Even if the proper parties were before it, this Court has no jurisdiction to hear such a claim (U.S. CONST. art. III; 28 U.S.C. § 1251 (1964)), nor would it be exercising an appellate function since neither the House of the 91st Congress nor its actions were before the courts below.

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* We submit, however, that the action taken by the 91st Congress constitutes a proper and lawful exercise of its constitutional power to "punish its Members for disorderly behavior". U.S. Const. art. I, § 5. Though rarely exercised, the power of the House to impose a fine is encompassed under that general power to punish. *See, e.g.*, 115 CONG. REC. H. 113 (daily ed. Jan. 3, 1969); *John L. McLaurin and Benjamin R. Tillman*, SENATE CASES 94-97; 25 CONG. REC. 162 (1893).

The power of the House to take away a Member's seniority can be justified pursuant to its power "to determine the Rules of its Proceedings", U.S. Const. art. I, §5. Even petitioners seem to concede as much, for their recently filed Memorandum does not even discuss the issue of Mr. Powell's seniority. *See also* Respondents' Memorandum on Mootness 7-8. No one has any right to seniority—as the recent action of the Democratic caucus of the House in stripping Congressman John R. Rarick of Louisiana of his seniority demonstrates. *See* 115 CONG. REC. E670-71 (daily ed. Jan. 30, 1969).

tempted by petitioners (Petitioners' Memorandum 16-17 note), the same is true here, for, as we have shown, Mr. Powell cannot successfully maintain a claim for back salary in this action, particularly against the Sergeant-at-Arms.*

Thus, as pointed out at pp. 63-64, *supra,* mandamus under 28 U.S.C. § 1361 (1964) can only be issued against officers and agents of the United States, and the Sergeant-at-Arms is not such an officer. As shown at pp. 64-66 *supra,* this Court cannot require the Sergeant-at-Arms to pay Mr. Powell in violation of his statutory authority and obligations to pay only Members, and it cannot order the Members to pass a resolution directing the Sergeant-at-Arms to pay him. Thus, whatever redress Mr. Powell may have in some court with respect to his back salary claim—such as a suit in the Court of Claims against the United States rather than the present defendants, *see* 28 U.S.C. § 1491 (1964), *Wilson* v. *United States,* 44 Ct. Cl. 428 (1909)—he has no claim which can be redressed in this suit against the House or its agents.**

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* *Bond* v. *Floyd, supra,* is not to the contrary on the issue of mootness. There, it was not the existence of Mr. Bond's claim for salary which prompted this Court to decide the case on the merits. The determinative factors were: (1) the term from which Mr. Bond was excluded from the Georgia Legislature did not end until December 31, 1966, and accordingly had not expired when this Court decided the case on December 5, 1966; and (2) Bond had not been seated at the time of this Court's decision, and there was a substantial likelihood that the Georgia Legislature would again exclude him. Here, however, the 90th Congress has terminated, and Mr. Powell has been seated in the House of the 91st Congress.

** In a suit against the United States in the Court of Claims, some of the jurisdictional challenges raised (such as the Speech and Debate Clause) might not be applicable, while others (such as the claim that the propriety of the House's exclusion of Mr. Powell is a political question) might still require consideration. Mr. Powell has never indicated that he intends to commence such an action, and the defendant in such a possible action is not before this Court. That such defenses might again be raised, therefore, does not prevent this action from being moot. *See Bank of Marin* v. *England,* 385 U.S. 99.

We submit, therefore, that Mr. Powell's claim for back salary is untenable and in no way affects the fact that this action is now moot.

C. *Mr. Powell's Claims Against the House of the 91st Congress Cannot Be Asserted in This Action.*

Petitioners argue that the action taken by the House of the 91st Congress in some way "continued" the alleged unconstitutional action of the prior House. They even state that our contrary assertion "flies in the face of all reality", Petitioners' Memorandum 13. It is petitioners' argument, however, which has lost touch with reality.

The action taken by the House of the 91st Congress is not related to the action taken by the House of the 90th Congress. The present House seated Mr. Powell and, in addition, imposed a punishment. The House of the 90th Congress excluded Mr. Powell. What action, therefore, did the present House take which "continued" the action of the prior House?

Moreover, as the Constitution and decisions of this Court make abundantly clear, the 91st Congress is an entirely different body from the one which excluded Mr. Powell. The Constitution (article I, section 2) requires the election of Members of the House every two years with the result that "neither the House . . . nor its committees are continuing bodies". *See Gojack* v. *United States*, 384 U.S. 702, 706-07 n.4; *McGrain* v. *Daugherty*, 273 U.S. 135, 181; *Marshall* v. *Gordon*, 243 U.S. 521, 542; *Anderson* v. *Dunn*, 6 Wheat. 204, 231. Not only is the present House a different entity at law; it is a different entity in fact. Forty-one of the present Members of the House were not Members of the 90th Congress, *see* N.Y. Times, Nov. 8, 1968, at 26, col. 6, and, indeed, two of the Members of the 90th Congress who are respondents here (Messrs. Moore and

Conclusion

For the reasons stated, the judgment of the Court of Appeals should be affirmed, or in the alternative, that judgment should be vacated and the case remanded to the District Court with directions to dismiss on the ground that the case is now moot.

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Respectfully submitted,

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